

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 162.

CHARLES E. APPLEBY, ASSURVIVING TRUSTEE OF THE
OGDEN LAND COMPANY, PLAINTIFF IN ERROR,

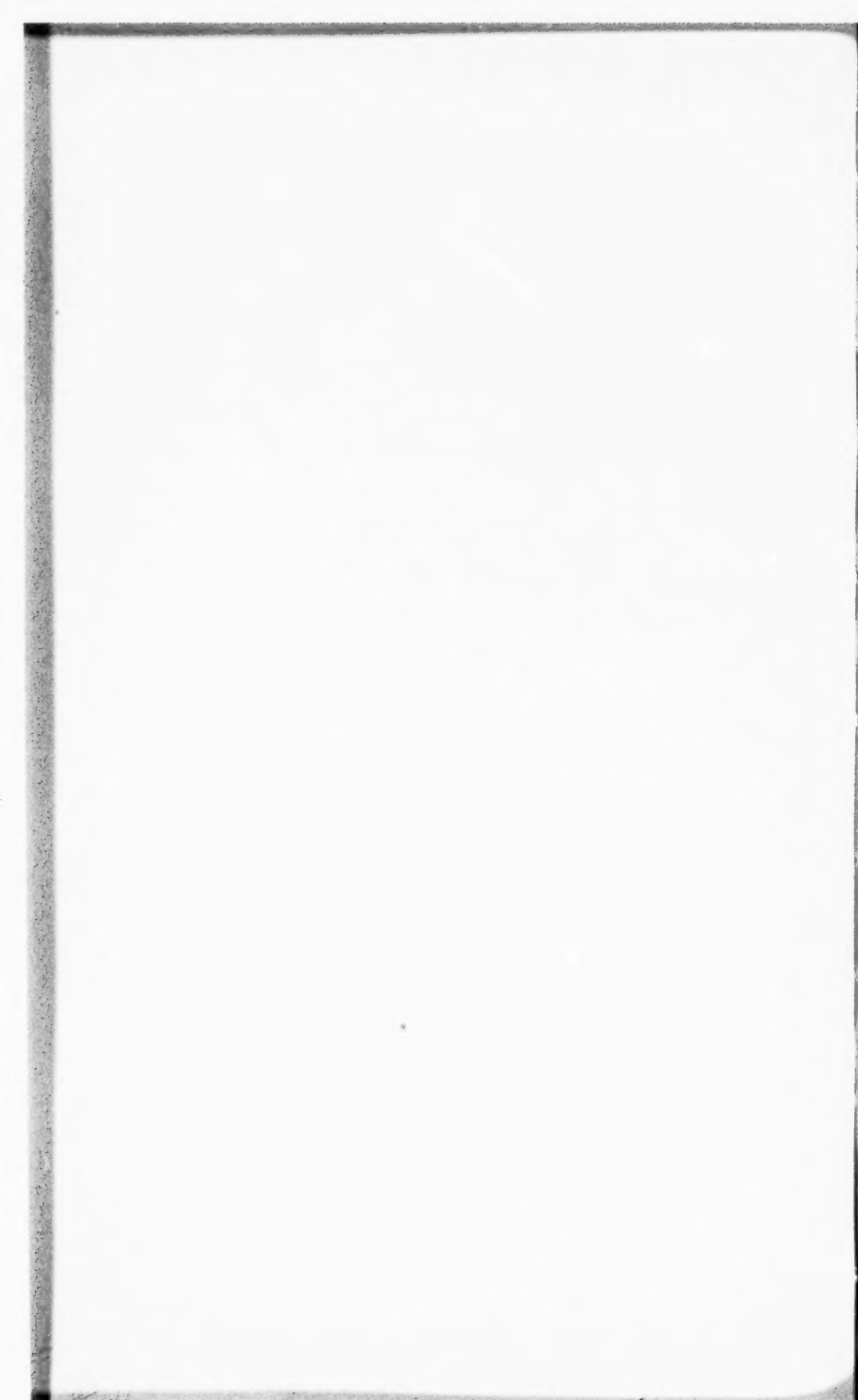
vs.

THE CITY OF BUFFALO.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

FILED MARCH 1, 1900.

(21,535.)



(21,535.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 162.

CHARLES E. APPLEBY, AS SURVIVING TRUSTEE OF THE
OGDEN LAND COMPANY, PLAINTIFF IN ERROR,

vs.

THE CITY OF BUFFALO.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

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Copy.

Return.

a

Filed May 2, 1907.

Court of Appeals, State of New York.

In the Matter of the Application of THE CITY OF BUFFALO to Acquire Lands under the Waters of the Buffalo River for the Purposes of a Public Highway.

Record on Appeal from Order.

Louis E. Desbecker, Attorney for Appellant, 31 City & County Hall, Buffalo, N. Y.

Octavius O. Cottle, Attorney for Respondent, 918 Ellicott Square, Buffalo, N. Y.

24/611. Buffalo, Hausauer-Jones Printing Co. 1907.

Filed Erie County Clerk's Office, Oct. 17, 1907.

Filed May 2, 1907.

b

Statement.

This is an eminent domain proceeding said to be taken under the charter of the City of Buffalo. There was no petition, no answer, no judgment of condemnation. The Board of Aldermen of Buffalo began the proceeding January 7, 1901, by a resolution and thereafter adopted notices of intention and determination. The proceeding was first brought into court, by a notice from the Corporation Counsel that he would on June 3, 1901, "apply for the appointment of three commissioners to ascertain the just compensation to be made" etc. June 5, 1901, Mr. Justice Hooker made a Special Term order appointing Fred Greiner, John O'Brien and Peter Maischoss Commissioners and striking out several railroad corporations, who were made parties because their railroads crossed the stream on bridges or had piers in the same. That left Chas. E. Appleby as surviving trustee, etc., the only party defendant. There was no opinion written.

1

Notice of Appeal from Order of Confirmation.

Supreme Court, Erie County.

In the Matter of the Application of THE CITY OF BUFFALO to Acquire Lands under the Waters of the Buffalo River for the Purposes of a Public Highway.

Please to take notice that Charles E. Appleby as surviving trustee for all the properties of certain tracts of land in the State of New

York, called Seneca Reservations, hereby appeals to the Appellate Division of the Supreme Court, Fourth Department, from an order of the Special Term of the Supreme Court, made in the above entitled proceeding, dated December 31st, 1901, and entered in the office of the Clerk of the County of Erie, on the 8th day of January, 1902, confirming the report of Commissioners in the above entitled proceeding and from the whole of said order, and will bring up for review on such appeal all antecedent proceedings, orders, exceptions, objections and rulings thereon, and the said report and the objections and exceptions taken before said Commissioners, and the preliminary objections taken to the motion for confirmation of said report, and the rulings of the Court thereon, the exceptions to said report, and objections and exceptions taken before said Commissioners, and the order made on the motion made by said trustees to set aside said report and the said order of confirmation, at
 2 a special Term held in Erie County on the 4th day of February, 1902.

Dated February 6, 1902.

Yours &c.,

O. O. COTTLE,
Attorney for Charles E. Appleby,
as Surviving Trustee, &c.

To Charles L. Feldman, Esq., Attorney for the City of Buffalo, and to the Clerk of Erie County.

Notice of Appeal from Order Denying Motion to Set Aside.

Supreme Court, Erie County.

(Title.)

Please take notice that Charles E. Appleby as surviving trustee for all the properties of certain tracts of land in the State of New York, called Seneca Reservations, hereby appeals to the Appellate Division of the Supreme Court, Fourth Department, from an order of the Special Term of the Supreme Court, made in the above entitled proceeding, dated February 10th, 1902, and entered in the office of the Clerk of Erie County on the 17th day of February, 1902, and from the whole of said order, and will bring up for review on said appeal all antecedent proceedings, orders, exceptions, objections, and rulings and the report of the Commissioners mentioned
 3 in said order, and the objections and exceptions taken before said Commissioners and the order of confirmation dated December 31st, 1901, referred to in the said order of February 10th, 1902, the exceptions to said report, and the objections taken before the Court on the hearing of the motion to set aside said report.

Yours &c.,

O. O. COTTLE,
Attorney for Charles E. Appleby,
as Surviving Trustee, &c.

To Charles L. Feldman, Esq., Attorney for the City of Buffalo and to the Clerk of Erie County.

Notices and Resolutions.

CITY CLERK'S OFFICE, CITY AND COUNTY HALL,
BUFFALO, April 5, 1901.

To Whom It May Concern: I Hereby Certify that at a session of the Board of Aldermen of the City of Buffalo, held in the City & County Hall, on the 7th day of January, A. D., 1901, a resolution was adopted, of which the following is a true copy:

By Ald. HOLMES:

"That the Board of Assessors are hereby directed to ascertain and certify the district that will be benefited and assessed by the taking in fee simple, for the purposes of a public highway, the lands under the waters of the Buffalo River between the Buffalo Creek Indian Reservation line at or near the crossing of Hamburg street and the easterly city line."

"Adopted."

4 And that at a session of the Board of Councilmen of the City of Buffalo, held in the City & County Hall, on the 9th day of January, A. D., 1901, the action of the Board of Aldermen in passing said resolution was duly concurred in.

And I further certify that said resolution was submitted to his honor, the Mayor of said City of Buffalo, by whom the same was approved on the 10th day of January, 1901.

Attest:

CHARLES F. SUSENDORF,

City Clerk.

Certificate of Assessors.

CITY CLERK'S OFFICE, CITY AND COUNTY HALL,
BUFFALO, April 5, 1901.

To Whom It May Concern: I Hereby Certify that at a session of the Board of Aldermen of the City of Buffalo, held in the City & County Hall on the 28th day of January, A. D., 1901, a resolution was adopted, of which the following is a true copy:

"That the following communication and certificate from the Board of Assessors, dated January 14, 1901, viz:

JANUARY 14, 1901.

"In compliance with the following resolution:

"That the Board of Assessors are hereby directed to ascertain and certify the district that will be affected and assessed by taking in fee simple for the purposes of a public highway, the lands under the waters of the Buffalo River, between the Buffalo Creek Indian Reservation line at or near the crossing of Hamburg street and the easterly City line."

5 "The Board of Assessors do hereby certify that in our opinion the improvement will not benefit any particular piece

of property, but will be a benefit to the City at large, and therefore should be a general fund expense.

"Respectfully submitted,

"EDWARD G. VOLZ,
 "THOMAS F. CROWLEY,
 "GEORGE STAUBER,
 "NICHOLAS J. MOCK,
 "ALBERT H. BEYER,
"Assessors."

be and the same is hereby confirmed.

Adopted.

And that at a session of the Board of Councilmen of the City of Buffalo, held in the City & County Hall, on the 30th day of January, 1901, the action of the Board of Aldermen in passing said resolution was duly concurred in.

And I further certify that said resolution was submitted to his honor, the Mayor of said City of Buffalo, by whom the same was approved on the 4th day of February, 1901.

Attest:

CHARLES F. SUSDRF,
City Clerk.

Notice of Intention.

CITY CLERK'S OFFICE, CITY AND COUNTY HALL,
 BUFFALO, April 5, 1901.

To Whom It May Concern: I Hereby Certify that at a session of the Board of Aldermen of the City of Buffalo, held in the City and County Hall, on the 4th day of February, A. D., 1901, a resolution was adopted of which the following is a true copy.

6

"By Ald. HOLMES:

"That the Common Council of the City of Buffalo intends to take in fee simple for the purposes of a public highway the lands under the waters of the Buffalo River between the Buffalo Creek Indian Reservation line at or near the crossing of Hamburg street and the easterly City line and that the expense of taking the same shall be paid by the general fund; and the City Clerk is hereby directed to cause this resolution of intention to be duly published."

"Adopted."

And that at a session of the Board of Councilmen of the City of Buffalo, held in the City & County Hall, on the 6th day of February, A. D., 1901, the action of the Board of Aldermen in passing said resolution was duly concurred in.

And I further certify that said resolution was submitted to his honor, the Mayor of said City of Buffalo, by whom the same was approved the 8th day of February, 1901.

Attest:

CHARLES F. SUSDRF,
City Clerk.

Affidavit of Publication.

(Venue.)

William G. Bryan of the City of Buffalo, being duly sworn, deposes and says, that he is the principal Clerk of the Buffalo Review Company, publishers and owners of the Buffalo Review, a public newspaper, published in said City; that the notice, of which the annexed printed slip, taken from said newspaper, is a copy, was inserted therein daily for two weeks, commencing on the 7 9th day of February, 1901, and ending on the 25th day of February, 1901, both days inclusive, being inserted 14 times.

WILLIAM G. BRYAN.

Sworn to before me this 13th day of April, 1901.

CHAS. H. BALME.

"CITY CLERK'S OFFICE,

"ROOM NO. 4, CITY AND COUNTY HALL,

"BUFFALO, Feb. 9, 1901.

"NOTICE OF INTENTION—Notice is hereby given that at a regular session of the Board of Aldermen of the City of Buffalo, held Monday, Feb. 4, 1901, a resolution of which the following is a correct copy, was duly adopted and that said resolution was duly approved by the Board of Councilmen at a session thereof, held February 5, 1901, viz:

"Resolved, That the Common Council of the City of Buffalo intends to take in fee simple for the purposes of a public highway the lands under the waters of the Buffalo River between the Buffalo Creek Indian Reservation line at or near the crossing of Hamburg street and the easterly City line, and that the expense of taking the same shall be paid by the general fund; and the City Clerk is hereby directed to cause this resolution of intention to be duly published.

"CHARLES F. SUSDRF.

"City Clerk."

Notice of Determination.

CITY CLERK'S OFFICE,

CITY AND COUNTY HALL,

BUFFALO, April 5, 1901.

To Whom It May Concern: I hereby certify that at a session of the Board of Aldermen of the City of Buffalo, held 8 in the City & County Hall, on the 25th day of February, 1901, a resolution was adopted of which the following is a true copy:

"By Ald. HOLMES:

"That the City of Buffalo has determined to take in fee simple, for the purposes of a public highway, the lands under the waters

of the Buffalo River, between the Buffalo Creek Indian Reservation line at or near the crossing of Hamburg street, and the easterly City line, and that the expense of taking the same shall be paid by the general fund."

Ayes—Ald. Avery, Barth, Busch, Butler, Collins, Cwiklinski, Damstadter, Dix, Franklin, Gorman, Haese, Hendler, Holmes, Huster, Kennedy, Kissinger, Knickenberg, Maischoss, Manning, McEachren, Roedel, Schneider, Schnellback, Sullivan—24.

Noes—None.

And that at a session of the Board of Councilmen of the City of Buffalo, held in the City and County Hall, on the 7th day of March, A. D., 1901, the action of the Board of Aldermen in passing said resolution was duly concurred in.

And I further certify that said resolution was submitted to his honor, the Mayor of said City of Buffalo, by whom the same was approved on the 11th day of March, 1901.

Attest:

CHARLES F. SUSDRF.

City Clerk.

Affidavit of Publication.

(Venue.)

9 William G. Bryan, of the City of Buffalo, being duly sworn, deposes and says, that he is the principal Clerk of the Buffalo Review Company, publishers and owners of the Buffalo Review, a public newspaper, published in said City; that the notice, of which the annexed printed slip, taken from said newspaper, is a copy, was inserted therein daily for fifteen days, commencing on the 6th day of May, 1901, and ending on the 22nd day of May, 1901, both days inclusive, being inserted fifteen times.

WILLIAM G. BRYAN.

Sworn to before me this 22nd day of May, 1901.

CHAS. H. BALME.

"Supreme Court, Erie County.

"In the Matter of the Application of the City of Buffalo to Acquire Lands under the Waters of the Buffalo River for the Purpose of a Public Highway.

"Notice is hereby given that the City of Buffalo has determined to take in fee and appropriate the lands under the waters of the Buffalo River, between the Buffalo Creek Indian Reservation line at or near the crossing of Hamburg street and the easterly City line, for the purposes of a public highway, and that at a Special term of the Supreme Court, to be held at the City and County Hall in the City of Buffalo, in and for the County of Erie, N. Y., on the 3rd of June, 1901, at ten o'clock in the forenoon of that

day, or as soon thereafter as counsel can be heard, the Corporation Counsel of the City of Buffalo will apply to said Court for the appointment of three commissioners to ascertain the just compensation to be made for such lands to the owners or mortgagees or parties in interest.

“W. H. CUDDEBACK,
*Corporation Counsel, 31 City and
 County Hall, Buffalo, N. Y.*”

10 *Affidavit of Service.*

(Title of Proceeding.)

STATE OF N. Y.,
County of Erie:

Matthew M. Edelman, being duly sworn, says that he resides at 11 E. 115th St. in the Borough of Manhattan, City of New York, and is 18 years of age; that on the 23rd day of May, 1901, he personally served the annexed notice upon Charles Edgar Appleby, as surviving trustee for all the properties of certain tracts of land in the State of New York, called the Seneca Reservation, and also upon the said Charles Edgar Appleby, individually, by delivering to and leaving with him two copies of the same, at No. 55 Liberty Street, addressed to him individually and the other addressed to him as such trustee.

Deponent further says that he knows said Charles Edgar Appleby and knows him to be the person to whom said notices were addressed.

MATTHEW M. EDELMAN,

Sworn to before me this 23rd day of May, 1901.

FRANK L. HOET.

Notary Public, N. Y. Co.

Affidavit of Service.

Title.

(Venue.)

Augustus Farron, being duly sworn, deposes and says, that he is
over the age of 21 years and resides in the City of Buffalo,
11 N. Y. That he is employed in the office of the Corporation
Counsel of said City.

That on the 22nd day of May, 1901, he served the annexed notice of determination to take lands and of application for the appointment of Commissioners herein upon each of the following named persons and corporations by personally depositing a copy of said notice in the post-office at Buffalo, N. Y., in a securely sealed wrapper, with postage prepaid, addressed to each of said persons and corporations at Buffalo, N. Y.: Lake Shore & Michigan Southern Railway, New York, Chicago & St. Louis Railway Company, The Buffalo

Creek Railroad Company, Western New York & Pennsylvania Railroad Company, Delaware, Lackawanna & Western Railroad Company, Pennsylvania Railroad Company, Charles Edgar Appleby, Charles Edgar Appleby, as surviving trustee for all the properties of certain tracts of land in the State of New York called the Seneca Reservations.

AUGUSTUS FARRON.

Sworn to before me this 1st day of June, 1901.

FRANK M. SPITZMILLER,

Com'r of Deeds, Buffalo, N. Y.

Notice of Motion.

To Charles Edgar Appleby, individually, and Charles Edgar Appleby, as surviving trustee for all properties of certain tracts of land in State of New York, called the Seneca Reservation; Lake Shore & Michigan Southern Railway Company; New York, Chicago & St. Louis Railroad Company; Buffalo Creek Railroad Company; Western New York & Pennsylvania Railroad Company; Delaware, Lackawanna & Western Railroad Company; New York, Lackawanna & Western Railroad Company; Pennsylvania Railroad Company:

(Title of the Proceeding.)

Notice is hereby given that the City of Buffalo has determined to take in fee and appropriate the lands under the waters of the Buffalo River, between the Buffalo Creek Indian Reservation line, at or near the crossing of Hamburg Street and the easterly City line, for the purposes of a public highway, and that at a special term of the Supreme Court to be held at the City & County Hall, in the City of Buffalo, in and for the County of Erie, N. Y., on the 3rd day of June, 1901, at 10 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, the Corporation Counsel of the City of Buffalo will apply to said Court for the appointment of three Commissioners to ascertain the just compensation to be made for such lands to the owners or mortgagees or parties in interest.

W. H. CUDEBACK,

Corporation Counsel, 31 City & County Hall, Buffalo, N. Y.

13 *Affidavit, F. M. Spitzmiller, June 1, 1901.*

(Title and Venue.)

Frank M. Spitzmiller, being duly sworn, deposes and says, that he is an attorney employed in the office of the Corporation Counsel of the City of Buffalo, N. Y., and has immediate charge of the above entitled proceeding. That all proper and requisite resolutions have been adopted by the Common Council and approved by the Mayor

preliminary to the appointment of Commissioners in accordance with the provisions of the Charter of the City of Buffalo, as appears by the certified copies of the said resolutions hereto annexed. That the notice of intention to take lands and the notice of determination to take lands herein, and the notice of this application have been duly published in the official paper of the City of Buffalo, as provided for in said Charter as appears by the affidavit of William G. Bryan hereto annexed. That due notice has been given in the manner provided for in Section 420 of said Charter by the Corporation Counsel to each person who, by the record of the Erie County Clerk's office, appears to be the owner or mortgagee of the lands to be taken and appropriated in this proceeding, or any part of said lands, as appears by the affidavits of Augustus Farron and Matthew M. Edelman. That none of said owners or mortgagees has an agent registered, as provided in said Charter, and that there are no inhabited buildings on said lands to be taken therein.

That no previous application has been made for an order appointing Commissioners herein.

FRANK M. SPITZMILLER.

14 Sworn to before me this 1st day of June, 1901.

AUGUSTUS FARRON.

Com'r Deeds, Buffalo, N. Y.

Order Appointing Commissioners, &c.

At a Special Term of the Supreme Court, Held in and for the County of Erie, at the City and County Hall, in the City of Buffalo, N. Y., on the 5th Day of June, 1901.

Present, Hon. Warren B. Hooker, Justice Presiding.

(Title.)

This application having been noticed to be made before this Court on June 3, 1901, at ten o'clock in the forenoon on said day, and having been by consent of all parties interested, regularly adjourned by this Court to this 5th day of June, 1901, at ten A. M., and on reading and filing due proof that all proceedings have been taken by the Board of Aldermen of the City of Buffalo, and concurred in by the Board of Councilmen of said City, and duly approved of by His Honor, the Mayor of said City, as required by the provision of the Charter of said City, and on reading and filing due proof of the publication of the notice of intention embodying the resolution which had theretofore been duly adopted by the Common Council of said City, and due proof of the publication of the notice of determination to take lands herein, and the notice of application for this order, and due proof of the service of said notice of determination, and of said application upon each person, who, by the records of the Erie County Clerk's office appears to be the owner or mortgagee of the lands to be taken in this proceed-

ing, or any part of them, and that no inhabited buildings are situate upon the premises to be taken herein; and William H. Cuddeback, Esq., appearing for the City of Buffalo, and Charles Edgar Appleby, appearing in person, individually and as surviving trustee for all the properties of certain tracts of land in the State of New York, called the Seneca Reservation; and by Octavius O. Cottle, Esq., his attorney; William C. Greene, Esq., appearing for the Lake Shore and Michigan Southern Railway Company; Louis L. Babcock, Esq., appearing for the New York, Chicago and St. Louis Railroad Company, for the Delaware, Lackawanna and Western Railroad, and the New York, Lackawanna and Western Railroad Company; William L. Marcy, Esq., appearing for the Buffalo Creek Railroad Company; William L. Rumsey, Esq., appearing for the Western New York and Pennsylvania Railroad Company, and for the Pennsylvania Railroad Company.

Now, on motion of William H. Cuddeback, Corporation Counsel, and attorney for the City of Buffalo, it is hereby.

Ordered, That Fred Greiner, John O'Brain and Peter Maischoss be and they are hereby appointed Commissioners to ascertain the just compensation to be made to the owners, mortgagees and persons interested, for the lands to be taken as described in the notices given by the petitioner herein, and that the said Commissioners hold their first meeting at the office of the Corporation Counsel of the City of Buffalo, No. 31 City and County Hall, Buffalo,

16 N. Y., on the 10th day of June, 1901, at two o'clock in the afternoon, and that said Commissioners make and file their report and return the same to this Court, together with all the evidence taken before them, with all convenient speed. And the said William H. Cuddeback, attorney for the City of Buffalo, and William C. Greene, Esq., Louis L. Babcock, Esq., William L. Marcy, Esq., and William L. Rumsey, Esq., attorneys for the railroad companies aforesaid, having stipulated in open Court that this proceeding be discontinued as against the said Lake Shore & Michigan Southern Railway Company, the New York, Chicago & St. Louis Railroad Company, the Buffalo Creek Railroad Company, The Western New York & Pennsylvania Railroad Company, the Delaware, Lackawanna & Western Railroad Company, the New York, Lackawanna & Western Railroad Company and the Pennsylvania Railroad Company, without prejudice to the rights and interests of any party to the proceeding herein, or to any action hereafter taken by them or any of them; now therefore, it is

Further Ordered, That this proceeding be and the same hereby is discontinued as against the said Lake Shore & Michigan Southern Railway Company, the New York, Chicago & St. Louis Railroad Company, The Buffalo Creek Railroad Company, The Western New York & Pennsylvania Railroad Company, the Delaware, Lackawanna & Western Railroad Company, the New York, Lackawanna & Western Railroad Company and the Pennsylvania Railroad Company, without prejudice to the rights and interests of any party

to this proceeding, or to any action hereafter taken by them or any of them.

17 Granted June 5, 1901.

PERRY E. WURST,
Sp. Dp. Clerk.

Roll, filed Aug. 30, 1901, contains following:

(In roll here follows order dated June 5, 1901, appointing Commissioners. Such order appears before.)

CITY'S EX. 1.—SEARCH.

The Erie County Guaranteed Search Company, a corporation duly incorporated under the laws of the State of New York, for a valuable consideration to it paid, doth hereby certify, guarantee and warrant to the City of Buffalo, that upon examination of the Indices to the Records of Deeds, in the office of the Clerk of the County of Erie, in the State of New York, from September 12, 1810, to and including the date hereof against only all the names appearing upon the following abstract during the several periods in which, by said abstract it appears there was a record interest in the premises therein described under said names, the following only being marginal numbers 1 to 12 inclusive, as shown upon the following abstract, were found affecting the title to the premises particularly described in said abstract.

[L. S.] Witness the corporate seal of said Company and signature of its President, this 20th day of March, 1901.

No. 63,680.

THE ERIE COUNTY GUARANTEED
SEARCH COMPANY.

By ———, *President.*

18 All that certain piece or parcel of land, situate in the City of Buffalo, County of Erie and State of New York, being part of the Buffalo Creek Indian Reservation in Township 10, Ranges 7 and 8, and described as follows:

Beginning at the point of intersection of the northerly line of Big Buffalo Creek with the westerly line of the Buffalo Creek Indian Reservation; running thence in an easterly direction following the northerly bank of said creek to the easterly line of the City of Buffalo; thence southerly along the easterly line of said City of Buffalo to the southerly line of Big Buffalo Creek; thence in a westerly direction following the bank of said creek to the westerly line of the Buffalo Creek Reservation; and thence northerly along the westerly line of said reservation to the place of beginning.

The premises intended to be described being the bed of Big Buffalo Creek lying between the westerly line of the Buffalo Creek Indian Reservation and the east line of the City of Buffalo.

1.

Wilhelm Willink and Others to David A. Ogden.

Deed dated September 12, 1810. Recorded in Liber 1 of Deeds, Page 68, May 30, 1811. Conveys all their right, title and interest in and to premises and more subject to the rights of the native Indians therein.

2.

David A. Ogden and Rebecca, his wife, to Robert Troup, Thomas L. Ogden and Benjamin W.

19 Trust deed dated February 8, 1821, recorded in Liber 6 of Deeds, Page 396, June 22, 1821, conveys same as last above deed to be held as joint tenants and not as tenants in common upon trust to convey, partition, &c.

3.

Benjamin W. Rogers, Thomas L. Ogden and Robert Troup, of the 1st Part; Charles G. Troup and Joseph Fellows, of the Second Part, and Thomas L. Ogden, Joseph Fellows and Charles G. Troup, of the Third Part.

Trust deed dated December 19, 1829, recorded in Liber 16 of Deeds, page 282, September 1, 1831, by which same as last above deed was conveyed to said parties of the third part to be held as joint tenants and not as tenants in common upon trust with full power to convey, partition, &c.

4.

The Seneca Nation of Indians to Thomas L. Ogden and Joseph Fellows.

Treaty dated January 15, 1838, recorded in Liber 82 of Deeds, Page 1, August 27, 1845, conveys all their interest in premises and more to be held as joint tenants and not as tenants in common.

5.

Joshua Waddington, Benjamin W. Rogers, Abraham Ogden, Duncan P. Campbell, Isaac Ogden, Robert Tillotson and Gabriel Shaw, by R. M. Blatchford, His Attorney, to Same.

20 Trust deed dated July 16, 1840, recorded in Liber 67 of Deeds, Page 198, May 21, 1842, conveys all their interest in premises and more to be held as joint tenants and not as tenants in common upon trust to convey, &c.

6.

The Seneca Nation of Indians to Same.

Deed dated May 20, 1842, recorded in Liber 106, of Deeds, Page 194, January 27, 1849, confirmatory of No. 4 above.

7.

Will of Charles G. Troup.

Will proved August 16, 1832, recorded in Liber 111, of Deeds, Page 32, July 25, 1850.

8.

Will of Thomas L. Ogden.

Will dated November 21, 1843, recorded in Liber 224, of Deeds, Page 531, June 25, 1863, proved in New York County, February 8, 1845.

9.

Joseph Fellows, Sole Surviving Trustee, to George R. Babcock and Charles E. Appleby, as Joint Tenants and not as Tenants in Common.

Deed dated September 21, 1871, recorded in Liber 293 of Deeds, Page 591, February 2, 1872, conveys all his interest in and to premises conveyed by No. 3 above to said 2nd parties upon like trust as same were held by said Joseph Fellows.

10.

21 Edmund H. Schermerhorn and William C. Schermerhorn, as Executors of the Last Will and Testament of Peter Schermerhorn, Deceased, and in Their Own Right, vs. Charles E. Appleby, in His Own Right and as Trustee of Certain Trusts Relating to Indian Reservations in the State of New York, and Others.

Supreme Court, Kings County. Judgment dated December 8, 1883, recorded in Liber 470 of Deeds, Page 55, May 31, 1884, by which it is decreed that by No. 9 the title to so much of the lands embraced in Nos. 2 and 3 as lands unsold became vested in George R. Babcock and Charles Edgar Appleby, as trustees. Recites the death of George R. Babcock and appoints William D. Waddington, trustee, in his place and stead.

11.

Will of George R. Babcock.

Will dated September 6, 1865, recorded in Erie County Surrogate's office in Liber 16 of Wills, Page 436, October 19, 1876.

12.

NOTE.—We have carefully examined all deeds indexed against Joseph Fellows, Chas. G. Troup, Thomas L. Ogden, George R. Babcock and Charles E. Appleby, trustees, of all lots and laid down in various surveys of the Buffalo Creek Reservation, which by said maps extended to said Big Buffalo Creek, and we find no deed

which, by specific description, conveys any of the bed of said creek, said conveyances being by lot numbers only.

22 No examination was made as against the grantees in such deeds nor any of them.

CITY'S EXHIBIT No. 8.

List of Deeds.

Lot.	Acres.	Deed.	Surveyor.	Lib.	Page.
1	21.52	77-282	Jas. Sperry	2	258
2	18.76	77-282	"	2	260
3	18.12	77-282	"	2	261
4	20.43	81-27	"	2	263
7	48.32	430-422	Emslie & Lovejoy	6	...
129	14.33	79-308	Sperry	2	322
129½	18.61	79-214	"	2	324
5	58.33	90-400	Emslie & Lovejoy	6	...
6	63.42	79-201	"	6	...
7	50.81	{ 81-94 268-31 300-663 }	Sperry	2	266
8	40.77	90-400	Emslie & Lovejoy	6	...
9	56.48	94-474	"	6	...
11	31.74	94-473	"	6	...
13	19.53	79-507	"	6	...
14	16.06	113-528	"	6	...
201	22.54	{ 81-61 77-282 81-63 }	"	6	...
60	9.30	94-438	Sperry	2	310
63	9.16	81-115	"	2	252
242½	16.44	79-2	"	2	175
51	37.61	79-109	"	2	231
52	44.50	79-279	"	2	233
55	16.85	79-279	"	2	238
56	9.09	79-279	"	2	239
59	14.41	81-108	"	2	244
23					
60	30.22	81-119	"	2	245
61	63.47	82-323	"	2	247
62	16.58	78-34	"	2	250
62½	13.94	113-514	"	2	249
63	9.06	81-115	"	2	252
65	21.84	{ 158-469 87-145 }	"	2	256
64	34.04	79-6	"	2	254
177	7.21	118-331	Emslie & Lovejoy	6	...
178	37.89	78-43	"	6	...
186	5.70	79-507	"	6	...

187	4.85	118-318	"	6	...
188	5.32	79-507	"	6	...
190	5.02	118-331	"	6	...
191	6.62	79-48	"	6	...
192	81.40	113-468	"	6	...
194	5.36	145-47	"	6	...
196	18.92	81-6	"	6	...
197	30.67	79-47	"	6	...
198	24.50	82-323	"	6	...
199	28.55	82-323	"	6	...
200	21.88	77-282	"	6	...
Ogden Gore,		13-148			

From Holland Land Co. to Bela D. Coe.

Commissioners' Oath.

Supreme Court, Erie County.

(Title and Venue.)

We, the undersigned commissioners duly appointed in the above entitled proceeding by an order of this Court, duly made and entered in the Erie County Clerk's office on the 7th day of June, 1901, do, for *himself*, severally, solemnly swear that we will support the Constitution of the United States and the Constitution of the State of New York; that we will faithfully perform the duties imposed upon us in this proceeding and will ascertain and report the just compensation to be made for the lands taken herein.

FRED GREINER.
JOHN O'BRIAN.
PETER MAISCHOSS.

Severally subscribed and sworn to before me this 10th day of June, 1901.

FRANK M. SPITZMILLER,
Commissioner of Deeds.

Commissioners' Report.

Supreme Court, Erie County.

(Title.)

To the Supreme Court of the State of New York:

We, the undersigned Commissioners, duly appointed by an order of the Supreme Court of Erie County made on the 5th day of June, 1901, do hereby report:

That on the 10th day of June, 1901, we duly took the oath of office prescribed by law, which is hereto annexed.

On the 10th day of June, 1901, at two o'clock in the afternoon, we met at the office of the Corporation Counsel, of the City of
 25 Buffalo, No. 31 City and County Hall, Buffalo, N. Y., pursuant to said order, and at said time and meeting we appointed a time and place for a hearing, and thereafter we proceeded to view and did view the lands to be taken in this proceeding.

We duly adjourned the proceedings before us from time to time and heard all the legal evidence offered by the City of Buffalo or any person interested in said lands. Upon the hearings we were attended by William H. Cuddeback, Corporation Counsel, and Frank M. Spitzmiller, for the City of Buffalo, and by Octavius O. Cottle, Esq., and Edmund P. Cottle, Esq., for Charles Edgar Appleby, as surviving trustee of the Ogden Land Company.

After hearing all the parties concerned, and taking all the proofs in the premises, and after due deliberation thereon, we ascertain and report as follows:

That the lands to be taken in this proceeding are described as follows: The lands under the waters of Buffalo River between the Buffalo Creek Indian Reservation line, at or near the crossing of Hamburg Street and the easterly City Line.

That for said description reference is also had to a map of said lands given in evidence upon said hearing before us and marked Exhibit No. 2, which is hereto annexed and made a part hereof also to a search or abstract of title of the property to be taken in this proceeding given in evidence upon said hearing before us, and marked Exhibit No. 1, which is hereto annexed and made a part hereof.

That for said lands as hereinbefore described and as shown
 26 and designated on said map, we ascertain and report the just compensation to be made to the owners of and to the parties interested in the said lands as follows:

To Charles Edgar Appleby.....	\$.06
To Charles Edgar Appleby, as surviving trustee of the Ogden Land Company.....	.06

And we do further report that we have been actually and necessarily engaged as such Commissioners in hearing proofs and preparing this report 25 days. Herewith returned and filed is all the testimony taken before us, the map of the lands to be taken, the abstract of title thereto, and all the exhibits offered and received in evidence before us, except the published statutes of the State and public records and documents on file in the office of the Clerk of Erie County and the office of the Board of Assessors of the City of Buffalo and other public offices, and such exhibits as are the property of private individuals who refuse to part therewith, and which, by the request and agreement of counsel, have been returned to their respective owners, but which, however, may be produced as this court shall direct, and the same and all thereof are hereby referred to and made a part of this report. For a further and more particular description of the exhibits not actually returned herewith, refer-

ence is made to the testimony aforesaid. All of which is respectfully submitted.

Dated Buffalo, N. Y., this 30th day of August, 1901.

FRED GREINER,
Chairman;
PETER MAISCHOSS,
JOHN J. O'BRIAN,
Commissioners.

27 On back of report is endorsed:

Report of Commissioners confirmed fees fixed: Greiner \$200, O'Brian \$150, MaischoSS \$150. D. J. K., J. S. C.

Exceptions to Report.

Supreme Court, Erie County.

(Title.)

Charles E. Appleby, as surviving trustee &c., excepts to the report of the Commissioners in the above entitled proceedings, dated August 30, 1901, on the following grounds, viz.:

First. The sum awarded is not just compensation for the property taken.

Second. The said report is contrary to and in violation of Section 6 Article 1 of the Constitution of the State of New York, which provides that private property shall not be taken for public use without just compensation.

Third. The said report is also contrary to and in violation of the Constitution of the United States, which provides that private property shall not be taken for public use without just compensation and the sum awarded by said report is less than just compensation.

Fourth. The award of six cents is only nominal compensation while the property taken is of much greater value.

Fifth. The owner of the fee of the land was entitled to substantial damages and the sum reported by the Commissioners is only nominal and much less than the damages sustained by the owner by the taking of the property.

28 Sixth. The report does not correctly report the facts or all of the evidence.

Seventh. The report is contrary to law, the facts and the evidence.

O. O. COTTLE,
Attorney for Charles E. Appleby, as
Surviving Trustee, &c.

Notice of Motion to Confirm Report.

(Title.)

SIR: Take Notice that upon the annexed resolution, the affidavit of Frank M. Spitzmiller, verified the 4th day of October, 1901, and

upon the minutes and evidence and all the papers and proceedings herein on file in the Erie County Clerk's Office, the Corporation Counsel of the City of Buffalo will apply to the Supreme Court, at a Special Term thereof to be held at the City and County Hall in the City of Buffalo, N. Y., on the 15th day of October, 1901, at ten o'clock in the forenoon, or as soon thereafter as counsel can be heard, for an order confirming the report of the Commissioners heretofore made herein and filed in the Erie County Clerk's Office on the 31st day of August, 1901, and for such other and further relief as the Court may deem just and proper.

Dated Buffalo, N. Y., October 4, 1901.

Yours &c.,

W. H. CUDDEBACK,

*Corporation Counsel, 31 City and
County Hall, Buffalo, N. Y.*

29 To Octavius O. Cottle, Esq., Attorney for Charles Edgar Appleby, as trustee, &c.

Affidavit of F. M. Spitzmiller, Oct. 4, 1901.

Supreme Court, Erie County.

(Title and Venue.)

Frank M. Spitzmiller, being duly sworn, says that he is an attorney and counselor at law; employed in the office of the Corporation Counsel of the City of Buffalo, and has charge of this proceeding. That on the 5th day of June, 1901, an order was duly made by the Supreme Court, Erie County, appointing three Commissioners to ascertain the just compensation to be made for the lands to be taken in this proceeding; that on the 10th day of June, 1901, the said Commissioners duly took the oath of office prescribed by law, and met pursuant to said order, and appointed a time and place for the hearing; and thereafter the said Commissioners viewed the said lands and duly adjourned the proceedings from time to time, and heard all legal evidence offered by the City, or any person interested in the said lands. That on the 31st day of July, 1901, upon the application of the Corporation Counsel, an order was made by the Supreme Court, Erie County, and filed in Erie County Clerk's Office on that day, extending the said Commissioners' time to make and file their report until 30 days from the 3rd day of August, 1901. That on the 31st day of August, 1901, the said Commissioners duly filed in the Erie County Clerk's Office their report signed

30 by all of said Commissioners, together with their oath, and all the testimony taken. That upon the 17th day of September, 1901, the Corporation Counsel communicated the fact of such filing, stating the whole amount of the awards, to the Common Council. That the Common Council, after the second regular meeting thereafter, and within three months from the time when the filing of said report was communicated to it by the Corporation

Counsel by a resolution adopted by the Board of Aldermen upon the 31st day of September, 1901, and by the Board of Councilmen upon the 2nd day of October, 1901, and approved by His Honor, the Mayor of the City of Buffalo, on the 4th day of October, 1901, directed the Corporation Counsel to apply to the Court for the confirmation of said report, as appears by the certified copy of said Council proceedings hereto annexed. That for the particulars thereof to more fully appear, reference is had to the evidence and minutes, all the papers and proceedings herein on file in the Erie County Clerk's Office, and they are hereby made a part hereof.

That no other application to court or judge for the confirmation of said report has been made.

FRANK M. SPITZMILLER.

Sworn to before me this 4th day of October, 1901.

ALPHONSE KARL.

Comm'r of Deeds, Buffalo, N. Y.

CITY CLERK'S OFFICE, CITY AND COUNTY HALL,

BUFFALO, Oct. 4, 1901.

To whom it may concern:

I hereby certify That at a session of the Board of Aldermen
31 of the City of Buffalo, held in the City and County Hall on the 30th day of September, A. D., 1901, a resolution was adopted, of which the following is a true copy:

Ald. Avery from the Committee on Finance presented the following report:

Your Committee on Finance to whom was referred, on the 17th day of September, 1901, the communication of the Corporation Counsel dated September 3, 1901, in the matter of the application of the City of Buffalo to acquire lands under the waters of the Buffalo River for the purpose of a public highway, which communication stated the fact of the filing of the report of the Commissioners in said proceeding and the whole amount of the awards made therein, respectfully report that they recommend that the Corporation Counsel be directed to apply to the court for the confirmation of said report.

Adopted.

And that at a session of the Board of Councilmen of the City of Buffalo, held in the City and County Hall, on the 2nd day of October, A. D., 1901, the action of the Board of Aldermen in passing said resolution was duly concurred in. And I further certify that said resolution was submitted to his Honor, the Mayor of said City of Buffalo, by whom the same was approved on the 4th day of October, 1901.

Attest:

CHARLES F. SUSDORF,

[L. s.]

City Clerk.

Affidavit of Commissioner Maischoß.

Supreme Court, Erie County.

Peter Maischoß being duly sworn, says that he is one of the Commissioners appointed in the above entitled proceeding by order of this Court to appraise land, being the bed of the Buffalo River, between the foot of Hamburg Street and the City Line in the City of Buffalo, N. Y.

That together with John O'Brien and Fred Greiner, his associates, he entered upon the labor of his duties on or about the 10th day of June, 1901.

That owing to a public demand for a speedy determination of such proceeding to obtain relief from floods, &c., deponent and his associates at once proceeded to a hearing and sat 25 sessions, nearly all of them occupying the entire day in taking testimony, giving precedence to this proceeding to the other business of the Commissioners. That witnesses were sworn before them, that the land in question comprises about 150 acres, being about 7 miles in length of such river bed. That the value of the lands as given by such witnesses ranged from nothing to 3 or 4 thousand dollars per acre and that the testimony taken covers 370 pages, that much time and great care was taken in the preparation of the Commissioners' report and his examination of the legal questions involved, and that the fees of such Commissioners is \$6.00 per day, which would amount to \$150.00 for account of such Commissioners. That such sum, deponent believes is inadequate for the time and labor expended in such proceeding by them and they ask that a reasonable allowance be made in addition to such fees.

PETER MAISCHOß.

33 The foregoing affidavit subscribed and sworn to before me this 15th day of October, 1901.

CHARLES J. DECKOP,
Com'r of Deeds, Buffalo, N. Y.

(Filed Dec. 31, 1901.)

(A copy of affidavit of O. O. Cottle, dated Oct. 15, 1901, read in opposition to motion to confirm, is set out in full later, annexed to this 15th day of October, 1901.

Order Confirming Report.

At a special term of the Supreme Court, held in and for the County of Erie, at the City and County Hall in the City of Buffalo, N. Y., on the 31st day of December, 1901.

Present—Hon. Daniel J. Kenefick, Justice presiding.

Supreme Court, Erie County.

(Title.)

Whereas, At a session of the Board of Aldermen of the City of Buffalo held at the City and County Hall on the 7th day of January, 1901, the following resolution was duly passed, to-wit:

"By Ald. HOLMES: "That the Board of Assessors are hereby directed to ascertain and certify the district that will be benefited and assessed by the taking in fee simple, for the purposes of a public highway, the lands under the waters of the Buffalo River between the Buffalo Creek Indian Reservation line at or near the crossing of Hamburg Street and the easterly city line.

"Adopted."

34 And

Whereas, At a session of the Board of Councilmen of the City of Buffalo held in the City and County Hall on the 9th day of January, 1901, the action of the Board of Aldermen in passing said resolution was duly approved; and

Whereas, Said resolution was thereafter duly presented to the Mayor of the City of Buffalo, by whom the same was duly approved on the 10th day of January, 1901, and his signature of approval was duly written thereon; and

Whereas, Thereafter by a communication dated January 14, 1901, the Board of Assessors of the City of Buffalo duly reported to the Common Council January 28, 1901, that,

BUFFALO, *January, 14, 1901.*

In compliance with the following resolution:

"That the Board of Assessors are hereby directed to ascertain and certify the district that will be benefited and assessed by the taking in fee simple, for the purposes of a public highway, the lands under the waters of the Buffalo River between the Buffalo Creek Indian Reservation line at or near the crossing of Hamburg street and the easterly city line."

—the Board of Assessors do hereby certify that in our opinion the improvement will not benefit any particular piece of property, but will be a benefit to the City at large and therefore should be a General Fund expense.

Respectfully submitted,

EDWARD G. VOLZ,
THOMAS CROWLEY,
GEORGE STAUBER,
NICHOLAS J. MOCK,
ALBERT H. BEYER,

Assessors."

35 Which said report and certificate were signed by Edward G. Volz, Thomas F. Crowley, George Stauber, Nicholas J. Mock and Albert H. Beyer, Assessors, they being a majority of the Board of Assessors of the City of Buffalo; and

Whereas, At a session of the Board of Councilmen of the City of Buffalo, held at the City and County Hall, on the 28th day of January, 1901, a resolution was duly passed by which the said certificate and report of the Board of Assessors was duly received and confirmed by the Board of Aldermen; and

Whereas, At a session of the Board of Councilmen of the City of Buffalo, held at the City and County Hall on the 30th day of January, 1901, the said resolution of the Board of Aldermen receiving and confirming said certificate and report of the Board of Assessors was duly approved; and

Whereas, Said resolution was thereafter duly presented to the Mayor of the City of Buffalo, by whom the same was duly approved on the 4th day of February, 1901, and his signature of approval duly written thereon; and

Whereas, At a session of the Board of Aldermen of the City of Buffalo, held on the 4th day of February, 1901, the following resolution of intention was duly passed, to-wit:

By Ald. HOLMES: "That the Common Council of the City of Buffalo intends to take in fee simple for the purposes of a public highway the lands under the waters of the Buffalo River between the Buffalo Creek Indian Reservation line at or near the crossing of Hamburg street and the easterly City Line, and that the expense of taking the same shall be paid by the General Fund; and
36 the City Clerk is hereby, directed to cause this resolution of intention to be duly published.

"Adopted."

And

Whereas, At a session of the Board of Councilmen of the City of Buffalo, held at the City and County Hall on the 6th day of February, 1901, the said resolution of intention so passed by the Board of Aldermen was duly approved; and

Whereas, Said resolution of intention was thereafter duly presented to the Mayor of the City of Buffalo, by whom the same was duly approved on the 8th day of February, 1901, and his signature of approval was duly written thereon; and

Whereas, Upon said resolution of intention becoming of force, the City Clerk of the City of Buffalo duly caused the same to be published in the official paper of the City of Buffalo, to-wit, the Buffalo Review, daily for two weeks, by causing the same to be published and inserted therein daily for fourteen days, commencing the 9th day of February, 1901, and ending the 25th day of February, 1901, both days inclusive, being inserted in each successive issue thereof and fourteen times, the following notice embodying said resolution, which notice was so inserted and published, to-wit:

BUFFALO, Feb. 9, 1901.

Notice of Intention.—Notice is hereby given that at a regular session of the Board of Aldermen of the City of Buffalo, held Monday, Feb. 4, 1901, a resolution of which the following is a correct copy, was duly adopted and that said resolution was duly approved by the

Board of Councilmen at a session thereof, held Feb. 6, 1901,
viz:

37 Resolved, That the Common Council of the City of Buffalo intends to take in fee simple for the purposes of a public highway the lands under the waters of the Buffalo River between the Buffalo Creek Indian Reservation line at or near the crossing of Hamburg Street and the easterly city line, and that the expense of taking the same shall be paid by the general fund; and the City Clerk is hereby directed to cause this resolution of intention to be duly published.

CHARLES F. SUSDORF,

City Clerk.

And

Whereas, Thereafter and within three months after the expiration of said publication, at a session of the Board of Aldermen, held in the City of Buffalo, at the City and County Hall, on the 25th day of February, 1901, the following resolution of determination was duly passed to-wit:

"By Ald. HOLMES: "That the City of Buffalo has determined to take in fee simple, for the purposes of a public highway, the lands under the waters of the Buffalo River, between the Buffalo Creek Indian Reservation Line at or near the crossing of Hamburg Street, and the easterly City Line, and that the expense of taking the same shall be paid by the General Fund.

"Adopted."

And said resolution being duly adopted by a two-thirds vote of the members of the Board of Aldermen; and

Whereas, At a session of the Board of Councilmen of the City of Buffalo, held at the City and County Hall on the 7th day of February, 1901, the resolution of determination so passed by said

Board of Aldermen was duly approved by the following vote:
 38 Ayes, Councilmen Bissing, Dunbar, Fleischmann, Klinck, Greiner, Ladd, Smith and Steul—8; noes, none; and said resolution being adopted by a vote of two thirds of the members of said Board of Councilmen; and

Whereas, The said resolution of determination was thereafter duly presented to the Mayor of the City of Buffalo by whom the same was duly approved on the 11th day of March, 1901; and

Whereas, Upon the resolution of determination becoming of force, thereafter the Corporation Counsel caused the following notice to be published daily for two weeks in the official paper of the City of Buffalo, to-wit, the Buffalo Review, which notice was published and inserted in said paper daily for two weeks, commencing on the 6th day of May, 1901, and ending on the 22nd day of May, 1901, both dates inclusive, in each successive issue and fifteen times, to-wit:

Supreme Court, Erie County.

In the Matter of the Application of the City of Buffalo to Acquire Lands Under the Waters of the Buffalo River for the Purposes of a Public Highway.

Notice is hereby given that the City of Buffalo has determined to take in fee and appropriate the lands under the waters of the Buffalo River, between the Buffalo Creek Indian Reservation line, at or near the crossing of Hamburg Street and the easterly city line, for the purposes of a public highway, and that at a special term of the Supreme Court, to be held at the City and County Hall in the City of Buffalo, in and for the County of Erie, N. Y., on the 3rd day of June, 1901, at ten o'clock in the forenoon of that day, or as soon
39 thereafter as counsel can be heard, the Corporation Counsel of the City of Buffalo will apply to said Court for the appointment of three commissioners to ascertain the just compensation to be made for such lands to the owners or mortgagees or parties in interest.

W. H. CUDDEBACK,

Corporation Counsel,

31 City and County Hall, Buffalo, N. Y.

And

Whereas, The Corporation Counsel gave due notice that the City had determined to *give* the lands described in said resolution of determination for the purpose stated therein, and that on a specified day he would apply to a Court to be held on that day in the City of Buffalo, naming the Court of Record to which such application was to be made, for the appointment of three commissioners to ascertain the just compensation to be made for such lands by duly publishing such notice hereinbefore set forth and by duly serving a copy thereof personally on each person who by the records of the Erie County Clerk's Office appeared to be the owner or mortgagee of such lands, or any part of them, and by duly depositing in the postoffice of the City of Buffalo, with the postage prepaid, addressed to him at Buffalo, at least ten days before the time when such application was to be made, in accordance with the terms and provisions of the Charter of the City of Buffalo, there being no inhabited building upon said lands; and

Whereas, At the opening of such court on the day designated in such notice, to-wit, on the 3rd day of June, 1901, at ten
40 o'clock in the morning, and as soon thereafter as he could be heard, the Corporation Counsel, upon a copy of said resolution duly certified by the City Clerk of the City of Buffalo, and due proof of the giving of said notice as aforesaid, applied to said Court, to-wit, the Supreme Court, Erie County, to appoint said commissioners, and such Court duly heard said application and all the parties who made their appearance, and on the 5th day of June, 1901, duly appointed Fred Greiner, John O'Brian and Peter Mais-

choss, three commissioners, to ascertain the just compensation to be made for such lands; that on the 10th day of June, 1901, the said commissioners met, pursuant to the said order appointing them, and before they entered upon their duties they each of them took and subscribed an oath that they would faithfully perform their duties and would ascertain and report the just compensation to be made for such lands, as prescribed by law, and they viewed said lands, and they appointed a time and place for a hearing, and they met pursuant to such appointments, and thereafter from time to time they met, pursuant to adjournments duly made, and they heard all legal evidence offered by the City and by any person interested in said lands, together with the objections and rulings thereon; and

Whereas, On the 30th day of August, 1901, the said commissioners duly filed in the Erie County Clerk's Office their report signed by all of said commissioners, together with their oaths and all the testimony taken, wherein they certify and report that upon the hearings they were attended by W. H. Cuddeback, Corporation

Counsel, and F. M. Spitzmiller, Esq., for the City of Buffalo, and by Octavius O. Cottle, Esq., and Edmund P. Cottle, Esq., for Charles Edgar Appleby, individually, and as trustee, and that the lands to be taken in this proceeding are described as follows: The lands under the waters of the Buffalo River, between the Buffalo Creek Indian Reservation line at or near the corner of Hamburg street and the easterly city line; that for a description of said lands reference is also had to the maps thereof given in evidence upon the hearings and duly marked as exhibits herein and annexed and mentioned in said report; and that for said lands they ascertain and report the just compensation to be made to the owners and persons interested in the said lands as follows:

To Charles Edgar Appleby.....	\$.06
To Chas. Edgar Appleby as surviving trustee of the Ogden Land Company06

And the Commissioners further report that they were actually and necessarily engaged as such commissioners in hearing said proofs and preparing their report twenty-five days; and

Whereas, Upon the filing of said report of said commissioners, and upon the 17th day of September, 1901, the said Corporation Counsel duly made a communication in writing to the Common Council of the City of Buffalo communicating the fact that such report was filed in the Erie County Clerk's Office on the 30th day of August, 1901, and therein setting forth the separate items of the awards made in said report and stating the whole amount of said awards, to-wit, twelve cents; and

Whereas, At a session of the Board of Aldermen of the City of Buffalo, held at the City and County Hall on the 30th day of September, 1901, the following resolution was duly passed, to-wit:

"Ald. Avery from the Committee on Finance presented the following report

"Your Committee on Finance, to whom was referred, on the 17th day of September, 1901, the communication of the Corporation Counsel dated September 3, 1901, in the matter of the application of the City of Buffalo to acquire lands under the waters of the Buffalo River for the purpose of a public highway, which communication stated the fact of the filing of the report of the Commissioners in said proceeding and the whole amount of the awards made therein, respectfully report that they recommend that the Corporation Counsel be directed to apply to the Court for the confirmation of said report.

"Adopted."

and

Whereas, At a session of the Board of Councilmen of the City of Buffalo, held at the City and County Hall on the 2nd day of October, 1901, the said resolution so passed by the Board of Aldermen was duly approved; and

Whereas, Said resolution was thereafter duly presented to the Mayor of the City of Buffalo, by whom the same was duly approved on the 4th day of October, 1901, and his signature of approval was duly written thereon, and said action of the Common Council in directing the Corporation Counsel to apply to the court for the confirmation of said report was duly taken after the second regular meeting after the Corporation Counsel had communicated to the Common Council the fact of the filing of said report; and

Whereas, Due notice of all proceedings herein has been served upon each and every attorney at law who has appeared for
43 any person in this proceeding and served notice thereof upon the Corporation Counsel;

Now, after reading and filing due proof of the making of the report of the Commissioners duly appointed herein, and the amount of the awards made by them for the lands to be taken in this proceeding, and after reading and filing due proof of the communication made by the Corporation Counsel to the Common Council communicating the fact of such filing and stating the whole amount of the awards, and due proof of the adoption by the Common Council of the resolution directing that the Corporation Counsel shall apply to this court for the confirmation of said report, and on reading and filing due proof of service of the notice of motion upon all persons entitled thereto, of the notice of this application, and the affidavits and papers upon which it was made, and hearing W. H. Cuddeback, Esq., Corporation Counsel, on behalf of the petitioner herein, the City of Buffalo, and O. O. Cottle Esq., on behalf of Charles Edgar Appleby, individually, and as surviving trustee of the Ogden Land Company, and due deliberation having been had thereon;

Now, on motion of Charles L. Feldman, Corporation Counsel of the City of Buffalo, it is

Ordered, That said report of said Commissioners herein filed in the Erie County Clerk's Office on the 30th day of August, 1901, be and the same is hereby in all respects confirmed and ratified, and that compensation be made to the owners and mortgagees of and the per-

sons interested in the lands to be taken in this proceeding pursuant to the determination of said commissioners contained in said report, which is hereby referred to for greater particularity; and it is

44 Further Ordered, That each of said commissioners be and they are hereby allowed the following fees for the time occupied by each of them in this proceeding: To Fred Greiner, for twenty-five days at \$6 a day, \$150; to John O'Brian, for twenty-five days at \$6 a day, \$150; to Peter Maischoss, for twenty-five days at \$6 a day, \$150; and that the additional sum of \$50 be and the same is hereby allowed to Fred Greiner as additional compensation for drawing the said report.

Affidavit of O. O. Cottle, Jan. 25, 1902, and Notice of Motion to Set Aside Report and Order.

(Title and Venue.)

Octavius O. Cottle, being duly sworn, says that he is the attorney for Charles E. Appleby, Trustee &c., in the above entitled proceeding. That the Commissioners' report in said proceeding was filed in the office of the Clerk of Erie County. That many Exhibits were read in evidence on the hearing before the Commissioners which are referred to in the minutes of testimony taken, but most of them were not filed with the report or with the testimony taken. That deponent in due time caused exceptions to said report to be duly filed and served on the attorney for the petitioner. That said petitioner served notice of an application to the Special Term of the Supreme Court for an order confirming said report. At the time and place specified in said notice deponent made preliminary objections to the hearing of such application on the ground that the evidence taken by the Commissioners had not all been filed
45 and that material exhibits and documents had been omitted and had not been filed with the evidence, and in support of such objections read and filed his affidavit verified October 15, 1901, of which a copy is hereto annexed, marked "A."

That the Court overruled the said objections and the motion to confirm was heard subject to such objections.

That afterwards the Court made an order confirming said report, a copy of which was served on deponent on the 8th day of January, 1902. That said order made no reference to the exceptions filed and served or to said preliminary objections or the affidavit read and filed in support of them, and recited an appearance by deponent and Edmund P. Cottle for Charles E. Appleby, individually and as trustee, while no appearance was made by them or either of them for Charles E. Appleby individually, but the appearance was for Charles E. Appleby, trustee, &c., for whom deponent served written notice of appearance, and said order was incorrect as deponent believes in other respects pointed out in the paper of which a copy is hereto annexed, marked "A." That soon after said order was served on deponent he called upon the petitioner's attorney and asked him

to correct said order and at his request deponent made out and gave him a copy of said paper "B," and he said he would look it over and let deponent know what he would do about it. Deponent has several times since asked him what he would do about it, but has been unable to get a decisive answer, he saying in substance that he had not yet been able to attend to it.

46 Deponent believes that the corrections asked for are material and necessary for the interests of said trustee in future proceedings to be taken on his behalf, and that further delay may be prejudicial.

O. O. COTTLE.

Sworn to before me January 25th, 1902.

F. BEAUMONT GRIFFITH, JR.,
Com'r of Deeds in and for Buffalo, N. Y.

Affidavit of O. O. Cottle, Oct. 15, 1901.

(Title and Venue.)

Octavius O. Cottle, being duly sworn, says that he is the attorney in the above entitled proceeding for Charles E. Appleby, as surviving trustee, &c., to whom, as owner of the property in question, an award of nominal compensation was made by the Commissioners in their report. That the evidence taken by the Commissioners has not all been filed with their report, particularly important exhibits necessary to show what was proved before the Commissioners.

Among the things omitted is the original map of Lovejoy and Emslie's survey, the field notes of Lovejoy and Emslie's survey of a part of the Buffalo Creek Indian Reservation and the deeds from the trustees of the Ogden Land Company of land near the Buffalo Creek (now called river). Such exhibits and documents are necessary to show that the interest in said river acquired by said company

47 or its trustees was never conveyed by said company or its trustees and became vested in the trustee above named. That as deponent believes the evidence omitted is material and necessary to show the extent of the interest of said trustee and to a full understanding of the legal rights involved.

Deponent objects to a hearing of an application for confirmation of the Commissioners' report until the evidence given before the Commissioners is filed with their report, or some statement of it made in such manner as to make it a part of the report.

O. O. COTTLE.

Sworn to before me October 15, 1901.

EDWIN S. KERR,
Commissioner of Deeds in and for the City of Buffalo, N. Y.

"B."

Strike out the word "duly" in the second line of Fol. 25.

In the 4th line of Fol. 25, strike out the words "all the testimony taken" and insert "the oral testimony of witnesses, but did not file

any of the documentary evidence, deeds, maps, field notes of survey or other exhibits produced and read in evidence before them and constituting a part of the proofs received by them, or any copy thereof."

In the 9th line of folio 25 strike out the words "individually, and."

After the words "City Line" in line 5 of folio 26, strike out all down to and including the words "mentioned in said report" in line 8 of folio 26.

After line 3 of folio 32 insert:

48 "Whereas, The said Charles Edgar Appleby, trustee, &c., duly filed in the office of the Clerk of Erie County, exceptions to said report and duly served a copy thereof and notice of filing on the Corporation Counsel.

"And Whereas, At the time and place for which notice of motion for confirmation of said report was given, the Counsel for the said Charles Edgar Appleby, trustee, &c., duly took preliminary objections to the hearing of the application for confirmation of the Commissioners' report until the evidence given before the Commissioners should be filed with their report or some statement of it made in such manner as to make it a part of the report, and in support of such objections read and filed the affidavit of O. O. Cottle, counsel for said trustee, verified October 15, 1901, showing that the evidence taken before the Commissioners had not all been filed, and specifying exhibits and documents that had been omitted, and grounds of objection to the hearing of said application.

"And, Whereas, The Court subject to and notwithstanding said preliminary objections, decided to and did proceed to hear said application for confirmation."

After the word "made," in line 8 of folio 33, insert "and the affidavit of O. O. Cottle, verified October 15, 1901, read in behalf of said Charles E. Appleby, trustee, &c., and his exceptions to said report duly filed and served as aforesaid."

In lines 1 and 2 of folio 34 strike out the words "individually and."

After the word "thereon," in line 8 of folio 24, insert, "except such as they excluded on objections made by an opposing party."

49 *Notice of Motion to Set Aside Report and Order.*

SIR: Take notice, That upon the annexed affidavit of O. O. Cottle, verified January 25, 1902, with a copy of which you are herewith served, and also upon the order of confirmation and the Commissioners' report therein referred to, a motion will be made at the next Special Term of this Court, appointed to be held at the Court House in the City of Buffalo, N. Y., in and for the County of Erie, on the 3d day of February, 1902, at the opening of the Court on that day, or as soon thereafter as counsel *can* be heard, for a rule or order in this proceeding, directing that said report and order be set aside for irregularity.

First. Because there was not filed with said report all of the evidence taken before the Commissioners.

Second. Because of the omission to file the Exhibits and documents mentioned in the affidavit or paper marked "A," annexed to said affidavit of January 25, 1902.

Third. That the said order be set aside because it is irregular in not mentioning the exceptions, affidavit, and objections specified in the paper marked "B," annexed to said affidavit of January 25, 1902, or for such other or further order or relief in the premises as shall be just, with costs of this motion.

Dated, the 25th day of January, 1902.

Yours, &c.,

O. O. COTTLE,

Attorney for Charles E. Appleby, Trustee, &c.

To Charles L. Feldman, Esq., Attorney for the Petitioner.

50 *Affidavit of W. H. Cuddeback, Feb. 1, 1902.*

(Title and Venue.)

William H. Cuddeback, being duly sworn, deposes and says, that he was formerly Corporation Counsel of the City of Buffalo, and that prior to January 1, 1902, he was attorney for the City of Buffalo in the above entitled proceeding; that on the 5th day of June, 1901, at a Special Term of the Supreme Court, held at the City and County Hall, in the City of Buffalo, N. Y., Hon. Warren B. Hooker, Justice Presiding, an application was duly made for an order appointing Commissioners to ascertain the just compensation to be made to the owners, mortgagees and persons interested in the lands to be taken in this proceeding. At the time and place of said application the following persons appeared in said proceeding: William H. Cuddeback, Esq., Attorney for the City of Buffalo; Charles Edgar Appleby appeared in person, individually and as surviving trustee for all the properties of certain tracts of land in the City of Buffalo, called the Seneca Reservation, and by Octavius O. Cottle, Esq., his attorney; William C. Green, Esq., as attorney for the Lake Shore & Michigan Southern Railway Company; Louis L. Babcock, Esq., as attorney for the New York, Chicago & St. Louis Railroad Company, for the Delaware, Lackawanna & Western Railroad Company, and the New York, Lackawanna & Western Railroad Company; William L. Marcy, Esq., attorney for the Buffalo Creek Railroad Company, and Frank Rumsey, Esq., attorney for the Western New York & Pennsylvania Railroad Company and for the Pennsylvania Railroad Company. That at such time and place an order was duly
51 granted by said Court appointing Fred Greiner, John O'Brian and Peter Maischoss commissioners to ascertain the just compensation to be made to the owners, mortgagees and persons interested for the lands to be taken in this proceeding. That said order fixed the time and place of the first meeting of said commis-

sioners on the 10th day of June, 1901, at two o'clock in the afternoon at the office of the Corporation Counsel of the City of Buffalo, No. 31 City and County Hall, Buffalo, N. Y. That all the appearances herein before mentioned were duly recited in said order appointing commissioners. That thereafter said order was duly entered in the Clerk's office of Erie County and copy thereof, together with notice of entry of said order duly served upon the persons entitled to notice. That thereafter and on the 10th day of June, 1901, at the hour and place mentioned in said order, said commissioners met, in pursuance of said order, and thereafter adjourned from time to time when testimony was taken and witnesses examined with reference to the matters involved in this proceeding. That thereafter and on the 31st day of August, 1901, said commissioners duly filed their report in the office of the Clerk of Erie County, wherein they made the following awards:

To Charles Edgar Appleby.....	\$.06
To Charles Edgar Appleby, as trustee of the Ogden Land Company06

That in said report the commissioners make the following statement: "Hereto attached and filed is all the testimony taken before us, the map of the lands to be taken, the abstract of title thereto and all the exhibits offered and received in evidence before us, except the published Statutes of the State and public records and documents on file in the office of the Clerk of Erie County and the office of the Board of Assessors of the City of Buffalo and other public offices, and such exhibits as are the property of private individuals, who refused to part therewith, and which by the request and agreement of counsel have been returned to their respective owners, but which, however, may be produced, as this Court shall direct, and the same and all thereof are hereby referred to and made a part of this report. For a further and more particular description of the exhibits not actually returned herewith, reference is made to the testimony aforesaid." That thereafter and on the 12th day of October, 1901, Octavius O. Cottle, Esq., as attorney for Charles E. Appleby, as trustee, &c., filed certain exceptions to the report of the Commissioners in the above entitled proceeding and a copy of which exceptions, together with notice of filing, were thereafter served upon the Corporation Counsel of the City of Buffalo.

Thereafter and on the 24th day of October, 1901, a motion was duly made at a Special Term of this Court, before Hon. Daniel J. Kenefick, Justice Presiding, to confirm the report of said Commissioners. That at such time and place, Octavius O. Cottle, Esq., appeared and raised certain preliminary objections to the hearing of the motion for the confirmation of said report, and read in support thereof a certain affidavit, dated October 15, 1901. That after hearing said preliminary objections the Court overruled same and heard the motion to confirm said report, at which time deponent was duly heard in support of said motion and Octavius O. Cottle, Esq., as attorney for Charles Edgar Appleby, as trustee,

tee, &c., was heard in opposition thereto. That on the 31st day of December, 1901, the Court duly confirmed the report of said Commissioners and fixed the fees to which the Commissioners were entitled and granted the order in accordance therewith, which was thereafter duly entered in the office of the Clerk of Erie County, and a copy thereof duly served, with Notice of Entry thereof, on O. O. Cottle, Esq., attorney for Charles E. Appleby, as trustee, &c.

Deponent further says that no objection was ever raised by the said O. O. Cottle, Esq., as attorney for Charles Edgar Appleby, as to the time when the report of said Commissioners was filed, and that no exception was taken thereto in exceptions to the Commissioners' report filed by the said O. O. Cottle.

Deponent further says that all the evidence taken in this proceeding, except such as is stated in the report of said Commissioners hereinbefore referred to, was duly filed by said Commissioners with the Clerk of Erie County at the time of the filing of your report. That attached to the report of said Commissioners is a map of the lands to be taken, together with the abstract of title of the same, which is referred to by said Commissioners for a further and particular description of the lands in question.

Deponent further says that the preliminary objections raised by Octavius O. Cottle, Esq., as attorney for Charles Edgar Appleby, as trustee, were heard and overruled by the Court previously to hearing the motion for confirmation of the report of said Commissioners and that the motion for the confirmation of said report was not heard subject to such preliminary objections.

Deponent further says that upon the motion to confirm said report all the evidence taken before said Commissioners was before the Court.

Deponent further says that the sources of his information as to the entry of the order confirming the said report in the Erie County Clerk's office, and the service of a copy thereof, with Notice of Entry of the same on Octavius O. Cottle, Esq., as attorney for Charles Edgar Appleby, is based upon statements made to deponent by Percy S. Lansdowne, Esq., Assistant City Attorney, who has the matter in charge; and that all the other facts hereinbefore alleged are within the knowledge of deponent.

W. H. CUDEBACK.

Sworn to before me this 1st day of February, 1902.

PERCY S. LANSDOWNE,

Com'r of Deeds, Buffalo, N. Y.

(Title and Venue.)

William H. Cuddeback, being duly sworn, deposes and says, that he was formerly Corporation Counsel of the City of Buffalo, and until January 1, 1902, was the attorney for the City in the above entitled proceeding.

Deponent further says that on or about the 30th day of August, 1901, it was agreed and stipulated verbally between Octavius O.

55 Cottle, as attorney for Charles Edgar Appleby, trustee, &c., and deponent, as attorney for the City of Buffalo, that the original map of Lovejoy & Emslie's survey, the field notes of Lovejoy & Emslie's survey of a part of the Buffalo Creek Indian Reservation, which formed a part of the exhibits in the above entitled proceeding, need not be marked by the Commissioners or be filed with the report of the Commissioners; that these exhibits are the property of private individuals. Such stipulation and agreement was made at the request of said Cottle and said exhibits were his own exhibits. That at the times the deeds and maps from the County Clerk's office and the Assessors' Office were read in evidence, deponent asked that they be not marked and that they be not attached to the Commissioners' report and said that either party could refer to them or produce them in Court at any time, as desired, and that the said Cottle made no objections thereto and Commissioners assented thereto.

WILLIAM H. CUDDEBACK.

Sworn to before me this 3rd day of February, 1902.

ALPHONSE KARL,
Com'r Deeds, Buffalo, N. Y.

(Title and Venue.)

Percy S. Lansdowne, being duly sworn, deposes and says, that he is Assistant City Attorney of the City of Buffalo and has charge of the above entitled proceeding. That an order was duly granted in this proceeding at the Special Term of the Supreme Court, held in the City and County Hall, in the City of Buffalo, N. Y., on 56 the 31st day of July, 1901, by Hon. Truman C. White, Justice Presiding, extending the time within which the Commissioners might make and file their report until 30 days from the 3rd day of August, 1901. That thereafter said order was duly entered in the Clerk's office of Erie County, and that a copy thereof, with Notice of Entry of same, was thereafter duly served on Octavius O. Cottle, Esq., as attorney for Charles F. Appleby, trustee, &c.

That the sources of deponent's information as to the above facts is based upon the books and records of the Corporation Counsel's office and entries made therein of the several steps taken in this proceeding and the several papers in this proceeding.

PERCY S. LANSDOWNE.

Sworn to before me this 3rd day of February, 1902.

AUGUSTUS FARRON,
Com'r of Deeds, Buffalo, N. Y.

Order Denying Motion and Order — Confirmation as Resettled.

At a special term of the Supreme Court, held in and for the County of Erie, at the City and County Hall, in the City of Buffalo, N. Y., on the 10th day of February, 1902.

Present, Hon. Daniel J. Kenefick, Justice Presiding.

Title.

57 An order confirming the Commissioners' report herein having been entered January 8, 1902, dated December 31, 1901, and the said Charles Edgar Appleby, as surviving trustee, &c., having served a notice of motion dated January 25, 1902, for a special term of the Supreme Court, to be held in Erie County on the 3rd day of February, 1902, to set aside the said order of confirmation and the Commissioners' Report, which notice was founded on the affidavit of O. O. Cottle, verified January 25, 1902, thereto annexed, and served therewith and the other proceedings specified in said notice, and the said motion having been brought to a hearing before the court and O. O. Cottle, Esq., of counsel for said Charles E. Appleby, as trustee, &c., having been heard in favor of the motion, and Percy S. Lansdowne, Esq., who read in opposition to said motion two affidavits of W. H. Cuddeback, verified on the 1st and 3rd days of February, 1902, respectively, and his own affidavit verified on the 3rd day of February, 1902, having opposed said motion in behalf of the petitioner, and the counsel for said Charles K. Appleby, as trustee, &c., having asked the court to set aside said report and order for want of jurisdiction: First, Alleging that there was no petition. Second, That the notice of intention is to take this property in fee and not any particular interest, or an interest of one person only, while the award does not cover what the notice of intention does, or just compensation for what the notice declares it is intended to take; and Third, That the property to be taken is not sufficiently described; also to set aside said report and order of confirmation for the irregularities specified in said notice of motion.

58 It is now ordered by the Court that the said motion in behalf of said Charles E. Appleby, as trustee, &c., be denied, and that the said order entered January 8, 1902, be modified and resettled so as to read as follows: * * *

(Here follows the resolutions and notices set forth before in the order of confirmation.)

Whereas, On the 30th day of August, 1901, the said Commissioners filed in the Erie County Clerk's Office their report signed by all of said Commissioners, together with their oaths, and wherein they certify that therewith is returned and filed all the testimony taken before them, the map of the lands to be taken, the abstract of title thereto, and all the exhibits offered and received in evidence before them, except the published statutes of the state and public records and documents on file in the office of the Clerk of Erie County and the office of the Board of Assessors of the City of Buffalo and other

public offices, and such exhibits as are the property of private individuals who refused to part therewith and which by the request and agreement of counsel, had been returned to their respective owners, but which, however, may be produced, as this court shall direct, and the same and all thereof are thereby referred to and made a part of said report, and for a further and more particular description of the exhibits not actually returned therewith the said report makes reference to the testimony filed by them, and wherein said Commissioners further certify and report that upon the hearing they were attended by William H. Cuddeback, Corporation Counsel, and Frank M. Spitzmiller, for the City of Buffalo; and by Octavius O. Cottle,

59 Esq., and Edmund P. Cottle, Esq., for Charles Edgar Appleby, as surviving trustee of the Ogden Land Company; and that the lands to be taken in this proceeding are described as follows: That lands under the waters of the Buffalo River between the Buffalo Creek Indian Reservation Line at or near the corner of Hamburg Street, and the easterly city line; that for said description reference is also had to a map of said lands given in evidence upon the hearing before said Commissioners and marked Exhibit No. 2, which is annexed to and made a part of said report; also to a search or abstract of title of the property to be taken in this proceeding given in evidence upon the hearing before said Commissioners and marked Exhibit No. 1, which is also annexed and made a part of said report, and which are referred to in the report of said Commissioners; and that for said lands they ascertain and report the just compensation to be made to the owners and persons interested in said lands, as follows: * * *

(Here the order same as first order — confirmation.)

Whereas, The said Charles Edgar Appleby, as trustee, &c., filed in the office of the Clerk of Erie County exceptions to said report and served a copy thereof and notice of filing upon the Corporation Counsel; and

Whereas, At the time and place for which said notice of motion for the confirmation of said report was given the counsel for the said Charles Edgar Appleby, as trustee, &c., duly took preliminary objections to the hearing of the application for the confirmation of the

60 Commissioners' report until the evidence given before the Commissioners should be filed with their report or some statement of it made in such manner as to make it a part of the report, and in support of said objections read and filed the affidavit of O. O. Cottle, Counsel for said trustee, verified October 15, 1901, alleging that the evidence taken before the Commissioners had not all been filed, and claiming to specify exhibits and documents that had been omitted, and grounds of objections to the hearing of said application; and

Whereas, The said court overruled said preliminary objections, and notwithstanding the same, decided to and did proceed to hear said application for confirmation:

Now, After reading and filing due proof of the making of the report of the Commissioners duly appointed herein, and the amount of the awards made by them for the lands to be taken in this proceed-

ing; and after reading and filing due proof of the communication made by the Corporation Counsel to the Common Council, communicating the fact of such filing and stating the whole amount of the awards, and due proof of the adoption by the Common Council of the resolution directing that the Corporation Counsel shall apply to this court for the confirmation of said report; and on reading and filing due proof of the service of the notice of motion upon all persons entitled thereto, and notice of this application, and the affidavits and papers upon which it was made, and the affidavit of O. O. Cottle, verified October 15, 1901, and read in behalf of Charles E. Appleby, trustee, &c., and his exceptions to said report duly filed and served as aforesaid, and hearing W. H. Cuddeback, Esq., Corporation Counsel, and O. O. Cottle, Esq., on behalf of Charles Edgar Appleby, in opposition to the motion, as surviving trustee of the Ogden Land Company, and due deliberation having been had thereon;

Now, On motion of Charles L. Feldman, Corporation Counsel of the City of Buffalo, it is

Ordered, That said report of said Commissioners herein filed in Erie County Clerk's office, on the 30th day of August, 1901, be and the same hereby is in all respects confirmed and ratified, and that compensation be made to the owners and mortgagees of and the persons interested in the lands to be taken in this proceeding, pursuant to the determination of said Commissioners contained in said report, which is hereby referred to for greater particularity; and it is

Further Ordered, That each of said Commissioners be and they are hereby allowed the following fees for the time occupied by each of them in this proceeding: To Fred Greiner, for 25 days at \$6 per day, \$150; to John O'Brian, for 25 days at \$6 a day, \$150; to Peter Maischoss, for 25 days at \$6 a day, \$150; and that the additional sum of \$50 be and the same is hereby allowed to Fred Greiner as additional compensation for drawing the said report.

Entered:

D. J. K., J. S. C.

Granted Feb. 10, 1902.

PERRY E. WURST.

Sp. Dep. Clerk.

STATE OF NEW YORK:

Supreme Court, County of Erie.

In the Matter of the Application of THE CITY OF BUFFALO to
62 Acquire Lands under the Waters of the Buffalo River for
the Purpose of a Public Highway.

Notice of Retainer.

SIR: Take Notice That I have been retained by and appear for the defendant, Edgar A. Appleby, surviving trustee, &c., in this proceeding, and demand that all notices and other papers therein be

served on me at my office, 828 Prudential Bldg., in the City of Buffalo, N. Y.

Dated June 5, 1901.

Yours, &c.,

O. O. COTTLE.

Attorney for Defendant.

P. O. Address, 828 Prudential Bldg., Buffalo, N. Y.

To W. H. Cuddeback, Petitioner's Attorney.

Personal Service of a notice, of which the above is a copy, is admitted this 5th day of June, 1901.

W. H. CUDDEBACK,

Attorney for City of Buffalo, N. Y.

Case.

Supreme Court, Erie County.

This proceeding is brought by the City of Buffalo, under its charter, to take in fee simple the "lands under the waters of Buffalo River" from the Indian Reservation Line (near Hamburg Street) to the City Line, in the City of Buffalo.

Charles E. Appleby, as surviving trustee of the Ogden Land Co., owns said land. June 5, 1901, Commissioners to appraise the value of said land were appointed by Mr. Justice Hooker. June 10, 1901, the Commissioners, Messrs. Fred Greiner, John O'Brian and Peter Maischoss, met at the City and County Hall, Buffalo, and having duly taken their oath of office, proceeded in the above entitled manner.

Messrs. W. H. Cuddeback and F. M. Spitzmiller, Counsel for the City of Buffalo.

Mr. O. O. Cottle, for C. E. Appleby, as surviving trustee of the Ogden Land Co.

June 20 and 25, 1901, the Commissioners viewed the land to be condemned.

On subsequent days the hearings continued.

The petitioner offered in evidence a title search of the property. The owner objected that the search did not go back to the original source of title. Search received in evidence and marked "Ex. 1." (Printed before in roll.)

F. V. E. BARDOL, sworn in behalf of City, testified:

I am a civil engineer and Chief Engineer of the Board of Public Works of Buffalo and have been for 3½ years, and I was when this survey of Buffalo River was made. I know Buffalo River. I know this map you show me. That is practically a correct representation of the Buffalo River from the Indian Reservation Line to the easterly city line. It was made a year ago, and is somewhat changed, but not enough to make any material difference on the map. That map correctly represents

64 the land to be taken in this proceeding. The land to be taken is all that part of the bed of the river beginning at Hamburg Street, following the irregularities of the Creek up to the easterly city line. The Reservation Line intersects the Creek just at Hamburg Street, slightly east of Hamburg Street. I have read the description in the notice of intention. The map correctly shows the land as described. This is a correct description: "The lands under the waters of the Buffalo River between the Buffalo Creek Indian Reservation Line at or near the crossing of Hamburg Street and the easterly city line." The only improvements in the bed of the river are the piers of the railroad companies. No others that I know of.

Cross-examined:

I haven't got with me the length of the river proposed to be taken: it is something like 25,000 feet, it may be 37,000.

Q. Something over seven miles?

A. I wouldn't say without looking it up. That map is drawn on a scale of 300 feet to the inch. I have not computed the area of the land to be taken. I can furnish it. I have measurements showing the width of the stream at various places; I have an accurate survey; they are on a map I have on a good deal larger scale, but they are not on that map. That is taken on a minus 4 level. A map drawn from the scale—this one has a slight defect—it wouldn't show any material difference in the depth of the water; the bed of the river is flat in a good many places. To show any difference we have got to get a map on a good deal larger scale than this is, about minus 4, between 4 and $4\frac{1}{2}$ is the average in the summer, when the water is down. In some places it is quite narrow and in some places
65 there is considerable width and bars where the water flows over in very small quantities; in some places the water is deep and in others it is shallow, but I know of no places where bars extend way across the creek—sort of islands here and there. The flow of the stream is approximately west, west and north and finally empties into Niagara River; from Hamburg Street to the City Line is up-stream. "Minus 4" is about the average water in the harbor; the surface of the water. In taking levels it is necessary to do so under what is called the "datum plane" that is usually taken as zero, and above you add for heights and below you deduct. It is ordinarily understood that the river is 3 feet, but for the last few years it has been as low as 4 and $4\frac{1}{2}$ below this plane, which is zero. The datum line is an arbitrary line, we have it located with reference to the U. S. levels, minus 3 for years was considered the average water, but the last few years it has been little below 3—about minus 4. The bars are continually shifting. When I was last over the line of the creek there were no bars extending way across. When I say the bars don't run way across I mean to say that the bars are not above the surface of the water; not extending away across; they are continually shifting; a bar is here one year and next year it is somewhere else, always shifting. I have been familiar with the creek as long as 14 or 15 years anyway. To my knowledge boats go up

the creek to the Chemical Works. I never saw boats go beyond there. The Chemical Works are at the Abbott Road. When they made the excavations for the Seneca Street bridge they did not have a dredge up there; they put in a coffer dam and dug it out by
 66 hand; canal boats the kind that navigate the Erie Canal, went up as far as the Chemical Works.

Map offered in evidence by the City and marked "Ex. 2."

(It is agreed that map need not be annexed to appeal book, but that copies may be furnished the Appellate Division.)

Petitioner Rests.

II. COWLES WADSWORTH, sworn for C. E. Appleby, testified:

I have resided in Buffalo 39 years. I am a lawyer and have dealt quite extensively in real estate in Buffalo, bought and sold large tracts and a good many of them. I am acquainted generally with Buffalo River from the Indian Reservation Line near Hamburg Street to the City Line, and know the values of land in that vicinity. In my opinion the value of the fee of Buffalo River between the points mentioned is all the way from \$4,000 an acre at the west end up to about \$1,000 an acre, \$1,200 an acre at the east end.

Cross-examination:

I base my judgment on the prices which have been paid for land down through there, and the uses to which land is put along the banks of the river. I do not know of any land in that locality that is situated as the bed of the Buffalo River is. Nearly the substance of my testimony is then that land above water in the neighborhood of Buffalo River is worth the price I have mentioned and the land in the bed of the river is worth nearly the same. I say it is worth nearly as much. I haven't considered that the river is a highway, anything of that kind, they asked me simply as to the land.

67 I mean to say that the quantity of land taken outside the river would be worth the prices which I have mentioned, and I haven't taken into consideration the fact that the bed of the river is covered with water and that it is a highway, except to the extent that I know. I suppose, the creek is going to be straightened some day; that is the way I arrived at my judgment.

Redirect examination:

There is a demand for waterways—dockage, to go to lands fronting on the river. Artificial channels have been excavated to a large extent and at much expense; the Blackwell and Lehigh Valley Canals, &c. In connection with land adjoining this river, parts of the river are valuable in that way and are susceptible to improvement in that way. I believe it would make the adjoining lands more valuable if so improved, and the privilege of making waterways would be worth considerable to the adjoining lands. This property, the right to the fee and the right to improve it for use in connection with adjoining lands possesses a considerable value. I should suppose so, but I don't know that is my opinion. I haven't had to

do with selling any. Lands in the vicinity having water frontage are worth much more than lands without.

Q. So that taking everything into consideration, should it be adjudged that this river is not now a highway, but the fee of the land with the right to improvements to it belongs to Mr. Appleby, what then would you say was the value of the fee of Buffalo River, the other adjoining owners having no right to build docks upon it and improve it, excavate it, so as to enhance the value of their property, without they had the fee of Buffalo River?

68 A. Without his consent, do you mean without Mr. Appleby's consent?

Q. If they couldn't get it without his consent.

A. Then it is worth every cent I have said.

To Commissioner MAIRSCHLOSS: My values are based on the bed simply as land.

Q. For what purpose is it worth that?

A. In selling a tract of land, if you sell to the center of the river, for instance, you would sell so many acres.

Q. You are not selling just the center of the river because you have got nothing on the side of it; you have simply got the bed of the river, do you place values on that as it exists today?

A. I base it upon the whole surrounding country being worth so much as land, that is water now.

Q. For what purpose is it worth that now?

A. For one thing it is going to be——

Q. I am asking for values upon the present condition of the land.

A. The present condition of the land cannot be made any great amount of use of.

Q. Then you wouldn't place that value on the present condition of it?

A. No, I figure on the future use.

Q. Then what future use? What would be required to make that worth that?

A. The water would have to be run off in another direction, in another way.

Q. And wouldn't the creek have to be filled up to be made available?

A. Yes, sir.

69 Q. Now could you tell us what the expense of it would be to make that worth \$4,000 an acre?

A. No, I don't know what the expense would be to fill it up.

Q. You don't know the depth of the Creek?

A. No, sir, except approximately, in some places.

Q. Do you think it would cost almost that amount to fill it up and make it available for building purposes?

A. Oh, it would cost considerable money to fill it up, of course, but it could be filled up largely from the City ashes and such stuff. I know that has been done.

Q. Not in your life time?

A. It would take some time.

Q. Then those figures that you gave would be based upon the land in condition for building, what it would be worth for building purposes.

A. Partly that and partly upon the question Mr. Cottle asked me, worth to be used for dockage purposes, you know, which would be——

CITY'S COUNSEL, interrupting:

Q. Don't you understand that the riparian owners have now the right to dock out to the deep waters in the stream?

A. That I know nothing about. Mr. Cuddeback, I suppose they have some rights there. * * * As a general thing I know what the nature of the rights of riparian owners upon streams is.

By Commissioner GRIENER: As I understand it your evidence is based entirely upon the proposition that Mr. Appleby is the absolute owner of the river and that nobody except himself has any rights upon it?

A. That is the basis of my testimony upon the questions asked by Mr. Cottle.

Redirect examination:

Assuming that the river is a public highway and that various persons had a right to pass over it, but not the right to excavate it or improve it without the consent of Mr. Appleby, and that the right to excavate and improve belonged to him as owner of the fee, that right of itself is of material value, in my opinion, to adjoining owners. If it could acquire the title to it it is very valuable. That right is worth to adjoining land some money for every foot wherever it fronts on the Creek, where it can be used for that purpose. I don't know just how much. I am not sufficiently familiar with dock value to state how much, not far from there the Lehigh Valley bought land and excavated long canals, on the old "Tift Farm." In selling land and adjoining lands, if they could sell to the center of the river and use it for any purpose that the fee would carry with it, the right to excavate and improve, or use with such land, the area in the river would be worth to the adjoining owners as much as the rest of their adjoining land and more.

Recross-examination:

I understand that Buffalo River is a navigable stream, between these points mentioned.

Q. What is the present market value of the bed of the river?

A. I am utterly unable to state. I don't know that it has any.

ERNEST SIEGESMUND, sworn for Mr. Appleby, testifies:

I am a Civil Engineer and Surveyor. I have examined a blue print of this map marked "Exhibit 2"; I assume that it is correctly drawn on a scale of 300 feet to the inch. The distance as shown on the map, from the Indian Reservation Line, near the foot of Hamburg Street, to the City Line is 7.023 miles. The area, within the bounds of Buffalo River, as shown on this map,

is 141.0055 acres. I have divided the river Reservation Line to the City Line into 22 sections, so as to have each section as nearly uniform in width as possible, and I have taken the average width of each section, they are as follows:

First, 1,300 feet long, 270 feet in width; second, 1,600, 240; third, 2,530, 240; fourth, 2,450, 180; fifth, 1,000, 175; sixth, 1,100, 210; seventh, 900, 220; eighth, 1,800, 200; ninth, 1,800, 200; tenth, 900, 180; eleventh, 1,400, 150; twelfth, 2,700, 100; thirteenth, 2,000, 160; fourteenth, 1,800, 220; fifteenth, 1,200, 160; sixteenth, 1,900, 200; seventeenth, 1,200, 110; eighteenth, 2,100, 130; nineteenth, 2,100, 110; twentieth, 2,000, 110; twenty-first, 900, 90; twenty-second, 2,400, 70.

The average width is 169.3 feet.

Cross-examination:

I took my measurements from the blue print which is a copy of "Exhibit 2." I didn't go upon the ground.

WILLIAM H. SLADE, sworn for C. E. Appleby, testifies:

I live at No. 1019 Main Street, in the City of Buffalo, and have since 1837; my business is real estate; I have been in that business since September, 1861; I have bought and sold land within the neighborhood of Buffalo River; I have owned land adjoining the water of Lake Erie, and the waters on Niagara River with the right to acquire the fee of the land under water, and by so owning, and dealing and selling acquired a knowledge of the value of land under water in Buffalo. Land under water in the City of Buffalo and adjoining Lake Erie and any navigable streams—Buffalo River, Niagara River—has a market value from my knowledge of such things and of the sales that have been made, and my knowledge of the additional value it gives to adjoining land; I have a knowledge and opinion of the value of the lands under water of Buffalo River between the Indian Reservation line and the City Line; I owned this lot No. 186 shown on the map; in my opinion the value of the fee of the bed of Buffalo River from the Indian Reservation line to the City Line is \$2,000 an acre on the average; the lands next the mouth of the river are worth more than further up, but I think the average would be \$2,000 an acre, in my opinion.

Q. You have had occasion to know that as a fact the people owning land adjoining the shore of Lake Erie have applied to a purchase the fee of the lands in some instances, have you not?

A. Yes, sir.

CITY'S COUNSEL: Has this any bearing upon this?

DEFENDANT'S COUNSEL: There is a value, it has a bearing on the value of land under water for sale in navigable places.

By Commissioner GREINER: I think the Commissioner will assume that.

73 Cross-examination:

I reach my estimate of \$2,000 as the value of this land by taking into account the situation, the increased area that would be given to

water fronts, and other fronts, by reason of this addition to it. Take No. 1, add the bed of the river to it and it increases the area of No. 1; that is assuming that the bed of the river is dry and the dry land added to the abutting property; in its present shape I think the value of the bed of Buffalo River, covered with water as we see it, as it stands today, is \$2,000 an acre. I would make a varied use of it; I do not know whether the river is a navigable stream or *it*; it is navigable for a certain distance; I do not think it is navigable above the Lake Shore Crossing; assuming that it is a navigable stream added to the lot through which the bed of the river runs it is worth to the adjoining property 2,000 an acre on the average. There are points on this map where if the bed of the river were separated in ownership from the shore lands it would make no difference in the value. In this stretch of seven miles there are cases where it has a direct front on a street, or a road and has connection with other water; outside of these cases where it has a frontage upon a street or road and separated in ownership from the rest, it is a difficult question to state what its value is. It is difficult to answer questions yes and no and at the same time give a reason for your conclusions. If you will give me the privilege of explaining how I got at my conclusions I will do so, but when I start in to do that I am confronted with "Answer the question yes or no." The value

74 of the bed of the river separated from any adjoining lands varies; there are points here where it fronts on a street; it is valuable in any event; its value is \$2,000 an acre independent of the ownership of the shore; what use could be made of — I would leave to the purchaser; the bed of the river has never been offered for sale; has never been in the market; it has a market value; I am willing to buy it if I can get a good title; where the street comes down to the bed of the river \$2,000 is too low an estimate; the bed of the river opposite public streets we could dock or improve; I am not taking so much area of that river as so much land and then placing the same value upon it that I would upon adjoining property not covered with water, flat and level, and in the same locality; I am doing nothing of the sort; when I put my estimate of \$2,000 on this piece from one end to the other I am allowing for the expense of reclaiming; whether it is a navigable river and can be reclaimed is a legal question which I leave to better legal minds than mine. In those cases where land has been acquired under the waters of Lake Erie and Niagara River in my notion the purchaser attached more value to the land under water than the dry land had; the owners of the up-lands in those cases got the land under water; the law of those grants forbids them going to any other than the up-land owners.

Redirect examination:

The up-land owners had to buy the land under water and pay for it, and in addition to paying the State they paid a higher value to the owner of the up-land than they would simply for land that was not adjoining land under water, and where they might not

75 have acquired the title to the land under water; land is worth what it is worth to anybody, for instance, taking a lot of

land with 50 feet front on a street and 100 or 200 feet in depth, with simply one foot wide between it and the street on the side, the one foot strip 200 feet deep would be difficult to use except in connection with some other property; by uniting the parcel 50 feet front and 200 feet deep with the parcel one foot front and 200 feet deep running along the side street you can make a lot of land 200 feet front on the side street, making the first parcel very much more valuable than it would be without the one foot strip; that happens often and in such a case it has a value for selling; by joining the two adjacent parcels the two are largely enhanced, although the one foot strip independently might not be particularly useful, but situated as it is it has a value to somebody else, and that is what makes a market value for property. Take Buffalo River seven miles in length running through mostly a business section, the privileges pertaining to the fee of the land, added to the adjoining land, are worth something, and I have expressed my opinion in respect to that, so that taking all these things into consideration my opinion as to its value remains at \$2,000 an acre. I have land fronting on Niagara River and have reason to know something about the values of land under water by reason of that as well as having owned land along the lake shore; I know how much it enhances adjoining land and what that land will sell for to owners of adjoining land. Near Buffalo River have been excavated extensive ship canals—the Blackwell Canal and the Lehigh Valley Railroad's Canal—the plan has not been fully carried out yet, they have carried it out in part. The Blackwell Canal and the Lehigh Valley Canal covers a large frontage and was made at a very large expense for the purpose of dockage and commercial purposes upon their banks; they expended large sums of money to get these navigable channels adjoining their lands; there are plans for extensive additional facilities of that kind that have been proclaimed and I think are expected to be carried out with the growth of commerce; the whole water front is owned by three or four from the toll gate crossing down to Stony Point; I think there are five individuals that own that front; a good deal of it has changed hands within five years; I was the owner of a considerable portion along that shore and had reason to know the effect upon the market value of adjoining land of the privilege of acquiring the fee to land under water; I found that riparian rights were worth more than the up-lands.

Counsel for Mr. Appleby reads in evidence a portion of the Charter of the Colony of Massachusetts Bay, found at page 94 of the Report of the Indian Problem, being N. Y. Assembly document No. 51, February 1, 1889, which contains a copy of the original grant from the King of Great Britain to the persons named therein; among the things that it grants from the Atlantic Ocean to the Pacific Ocean is all the land, grounds, wharves, ports, rivers, waters, fishing, mines and minerals, etc., so that the grant included a grant of the rivers and waters within that area to this company (annexed to end of case is extract from that grant.)

77 Counsel for Mr. Appleby reads from an Act of the Legislature of the State of New York, which appointed commissioners to settle the conflicting claims between the State of Massachusetts and the State of New York to lands which included Buffalo River (annexed at end of case, is statement as to same).

Counsel for Mr. Appleby also reads a deed dated December 10, 1786, recorded in Erie County Clerk's office in Liber 26 of Deeds at page 469. A copy of that deed is set forth in aforesaid report at page 105 (annexed to case see a synopsis of said conveyance.) He then read in evidence an agreement dated March 12, 1791, recorded November 26, 1834, in Liber 24 of Deeds at page 408, and conveying from the State of Massachusetts to Samuel Ogden; also a release from Samuel Ogden to the State of Massachusetts dated May 11, 1791, recorded in Liber 24, page 413; also a deed from the State of Massachusetts to Robert Morris, dated May 11, 1791, recorded in Liber 24 at page 418 including the premises in question; also a deed from the same to the same dated May 11, 1791, recorded in Liber 24, page 415; also a deed from Robert Morris, by Sheriff, to Thomas L. Ogden, dated May 13, 1800, recorded in Liber 24 at page 406; also a deed dated May 18, 1801, from Thomas L. Ogden and Robert Morris to Wilhelm Willink and others; and that is the title ahead of the Holland Land Company. The city introduced a search from the Holland Land Company down; that abstract brings the title down to Charles E. Appleby, Trustee. He also reads a judgment of the Supreme Court, Kings County, dated December 8, 1883, confirming the title in Charles E. Appleby, surviving trustee. (At end of case is statement as to the foregoing conveyances, etc.)

78 JOHN OTTO, JR., sworn for C. E. Appleby testifies:

I am a real estate dealer in the City of Buffalo, and have been for 19 or 20 years, and my father was one before me; I have frequently been a witness for the City in grade crossing proceedings, and am familiar with the values of land in the City of Buffalo, and particularly in the neighborhood of Buffalo River between Hamburg Street and the City Line; for a number of years I have kept track of sales through that neighborhood and the improvements and changes going on as a matter of business (witness shown map marked "Exhibit 2"). I see on the map an island put down as owned by the Buffalo Hardwood Lumber Company; I know that island, I once had an interest in it and sold it so that I am familiar with the conditions there. I have considered all the circumstances and surroundings in connection with the river, and even assumed that it is a public highway. I know the Lehigh Valley purchased here and that they have built canals near; that they bought land and expended money in addition on the land in making canals; I am familiar with the values of water front properties. I have taken this river up in detail; I know the bed of the river as shown on that map and on the ground; I have taken it up in detail and considered the varying values of different portions of it, and averaged it; in my opinion the average value per acre of the river is \$2,100; there are about 140

acres, that is putting the various values on it according to the surrounding circumstances and the things that we have assumed. Assuming that the river were not a public highway I should think it would be worth about 20 per cent. more than I have stated, if you could absolutely control it.

79 Cross-examination.

I reach the conclusion that this land is worth \$2,100 an acre on an average by putting values on different sections of it approximately; the prices of neighboring property are a little below, probably; I assume that the bed of the river is severed from the ownership of the adjoining shores; assuming that the stream is a navigable one, it could be used for the purposes for which it is now being talked of being used, namely for the purpose of straightening out and changing the bed of the river in some places; assuming that it is a highway and that it is to remain in its present condition with the water flowing over it, it could not be used for much other purpose than it is now; if you leave it as it is the possibilities of it are what give it a value, in my opinion. I understand the owner has some control of the stream, question of docks and all that sort of thing, question of bridging; assuming that the water is to flow as it now flows there, and that the stream is a navigable one the owner could not make very much use of it, leaving it as it is the possibilities—in the present condition with the water running over it, the stream being a highway, I think it has a value for its possibilities; just as land under water may have no value in one sense for the present use. I think it is worth something to neighboring property owners if they could have all the fee to it, if I understand rightly what goes with the fee, rights to certain control of it; I think it is worth the price I put upon it for its ultimate possibilities. I do not know of any other purpose

80 that it can be put to unless you divert the stream, unless you have a certain control over the water of the stream, and the bridging of the stream, the right to exclude people from it, and the right to say when and where bridges shall be put; there is that possibility; the value is largely in the possibility of it, just as it is in any vacant piece of land; if it were absolutely sure that this stream would never be changed it probably would not be worth so much, if you can eliminate that possibility, but I can't eliminate that possibility in my mind; I do not know what the value of it would be with no possibilities; if I were supposing that I were going to sell the bed of the river in its present condition today, in the market, it is very difficult to say what it would bring in today's market; it has a value in my judgment what I said, but if you had to go out and sell it in today's market it is very difficult to answer that about any property; in my estimate I am assuming that the City has certain rights, or possible rights over the water.

By Commissioner GREINER:

Q. Assuming that this is a public highway and that the only interest that the person has in whom the title is the same as that of

any other citizen, same as your interest, the right to go in and upon it. What would you say then was the value?

A. There isn't any title practically on that then.

DEFENDANT'S COUNSEL: That would hardly be the ownership of the fee if a person only had the right to go upon it in common with everybody else.

Objection over-ruled and exception.

WITNESS: I think the value is the same, but I don't know who would get the money; I think the value is just the same, the land is there.

81

CITY'S COUNSEL:

Q. Now, Mr. Otto, assuming that this is a natural water course and that the water must continue to run over the bed of the river as it has done in the past, the water flows down from the high land, upland, to this stream and into Lake Erie, it being a natural water course, and this flow of water must continue, what would you say then would be the fair value?

A. You mean there is no possibility of changing the line of the stream?

Q. Yes.

DEFENDANT'S COUNSEL: I suppose there we should reserve the objection that there is no proof of any of the facts assumed.

Commissioner GREINER: If they don't give proofs we will strike out this evidence.

A. I don't know how to answer that question. The principal value would be the right of control, as to the erection of docks, bridging and advantages of that sort, if there is no possibility of ever changing the stream.

Q. What would you say under the circumstances I have stated, the value of the land is?

A. I don't know as I can answer that question. I haven't considered it in that light.

Redirect examination.

I remember the Terrace proceedings where Mr. Pratt was interested, there was a public street with pavement and everything, and the City merely took the fee and awarded him damages for it; I understand that there was an award in the neighborhood of \$10,-
 82 000 (City's Counsel; \$6,000); there was a street there that was apparently always going to be there and used as a street, and nothing but the difference between the fee and an easement; I suppose I know of people buying lands near Buffalo River and then excavating it for a waterway, in that case the expense of excavating added to the expense of the land made the value of the land. My reference to "possibilities" is based partially on what has already been done in straightening the river and making cuts. I know that substantial awards have been made there for straightening the river and leaving the old part of the river abandoned, then straightening

the river and making a shorter cut; I recall on Elmwood Avenue, corner of Lexington, that after they widened Elmwood Avenue there was a strip of one foot left from cutting off frontage on Elmwood Avenue from the next lot on Lexington—Highland, one of those streets. It left a one foot front on Highland Avenue and 200 feet along Elmwood Avenue, adjoining a lot of 200 feet in depth belonging to another person.

Q. And that the owner of the foot strip gave all his lot, except 30 feet on Elmwood Avenue, for the depth of the other lot, making it then a convenient lot.

CITY'S COUNSEL: I object to that as improper and immaterial.
Objection sustained. Exception.

WITNESS: There are a good many railroads in the vicinity of the river as shown on this map, some of the lots have a very little depth
83 between the street and the river; all these things are to be considered in estimating the value of the river, and a good many streets if extended, that now have no crossing of the river, would cross it; it has been building up and is active in that vicinity; at the present there are very few crossings of the river between Hamburg Street and the City Line although there are a good many streets laid out as running down to the river. The right to extend these streets across the river would be a possibility in considering values, and the right of railroads to cross there would be one of the possibilities. It is more or less true that the possibilities and probabilities for which you can use land enter into all values.

Recross-examination.

In the Pratt case that I spoke of on the Terrace, I supposed that Mr. Pratt owned the property that abutted upon the Terrace where he got these damages; I know that the railroad company made a deep cut in the street in front of Pratt's property, where the New York Central tracks are carried through the street on a sub-way. I understand that the awards that I speak of, which were made for straightening Buffalo River were awards that were given for lands above the water that was taken to straighten the stream.

Redirect examination:

I know of cases of moderate size streams running through acreage land where purchasers have paid the same value for the bed of the stream as they have paid for the adjacent land; in selling by the acre it is not an uncommon way of selling it to include the bed of the stream in the amount of acreage which they buy and it then has
the same value as the adjacent land in selling.

84 To City's Counsel: I know of such a case, and I know where land was sold by acreage with the stream running through it; it was in the city, within the city limits, between Delavan Avenue and Ferry streets, a little west of Bailey; land near Scajaquada Creek, that land crossed the stream and they included in the acreage the land in the stream. I figured that my figures were a little low for the value of the up-lands adjacent to Buffalo River, that

it might average passibly \$2,500 an acre, it averages that from the City Line down to Hamburg Street; perhaps \$2,300 to \$2,500. In this case that I speak of near Scajaquada Creek I do not know that the whole tract would have brought a larger price if this creek had not run through it; it was not considered much of a detriment; the question was never raised; I think it would have been better if that creek were eliminated.

Redirect examination continued:

I mean by that that the adjoining land would have been increased in value if they had eliminated that creek, and eliminating it would have increased the value of the land just so much. I am familiar with the territory around Little Buffalo Creek; I know that there was once a creek running there, that creek was abandoned and it is almost all filled in now; I understand from the sweepings and ashes of the city; the same thing was true on Delaware Avenue and Carolina Street; big, wide places where streams ran through, these are filled in and now are apparently the same as adjoining land and were filled in gradually from the sweepings and refuse of the city. I think that it is not an uncommon thing for a stream to be diverted and filled; I understand that at Hertel Avenue, Cornelius Creek has been diverted and turned into a trunk sewer; those were all cases of pretty small streams, none of them as large as Buffalo River except at its west end; the lower part of Buffalo River is such that canal boats can run on it, or other boats, whereas the upper part is too shallow; there are two different classes of the river to be considered.

SPENCER S. KINGSLEY, sworn for C. E. Appleby, testifies:

I have been a real estate dealer in the City of Buffalo for 12 years; I have been President of the Real Estate Exchange in this city, and have frequently been called as an expert witness in appraisal proceedings both in street proceedings and grade crossing proceedings. (Witness shown map "Exhibit 2"). I have examined that map and am familiar with the property itself, and have been for some years. I know of the values of land in that vicinity; considering those facts and assuming that Buffalo River is a public highway, in my opinion the average value of the bed of that stream from Hamburg Street to the City Line is \$2,000 an acre; assuming that it is not a public highway the value would be increased I should say at least 20 to 25 per cent. I have considered in all these estimates the different values of different portions of the stream, and made that average, taking it as a whole, and I consider that is a fair way to arrive at the fair value of the stream.

Cross-examination:

I figure the average value of the shore land somewhat over \$2,000 an acre, I should say from \$2,200 to \$2,400. I should say adjoining land is worth at least \$2,200; I should say it runs from \$2,200 to \$2,500; \$2,600, on an average; in my judgment the value of the land in the bed of the river is \$2,000 an acre, and the shore land worth only \$600 an acre more. The land in

Buffalo River in its present condition could be used for dockage purposes; navigation purposes; could be used for taking material from it and selling it; could be used for selling the rights for crossings and such purposes as that. I understand that the bed of the river is separated in ownership from the shore land, and my estimate of value is made on the assumption that the river can be made navigable and that it is a public highway, and part of my estimate of value is that the owner may excavate material from the bottom of it, and that he may construct docks, and the control of the water, water supply. I think he can prevent adjoining property owners from pumping water out of it and sewerage into it. The possibility of changing for adjoining properties, and the possibilities for the future, what it will bring no man knows; like any other property it has a value that time will work out. There is a value in the ownership of it, the control of it; that is also a factor; factors of that kind that you cannot definitely analyze; the actual value of property down to the different elements that constitute value; I have taken those all into consideration. In its present shape to the owner it has a general value of ownership; I cannot give you the exact percentage of value in its present condition; but I have taken those things all into consideration, I do not see how they can be separated from the value,

87 I can't; I don't know as a matter of fact that if that river is a highway the owner can't put docks on it; I don't understand that the owner of the upland can take any reasonable amount of water out of there, whether he owns the fee or not. I understand the owner of the fee can shut off the adjoining shore owners from allowing water to escape into the river. All those things I have estimated as part of the value of the fee. I am not able to say what this right of title or right of control, which you speak of, is worth independently of these other considerations. I suppose the river is a natural water course and that the water can continue to flow through it unless other provision is made for it; under those circumstances I could not change my opinion as to the present market value of the bed of the river; I don't believe that any man living is capable of telling the market value of that property, or of any property; I don't agree with you that it is worth what it will bring in the market; I don't believe that there is any market value to that property today, any property, unless some property for the time being in the market; if there is a fair market there is a market value; I don't think there is any market for it; I know of no market for that property; I don't know anything about auctioning real estate; I couldn't say what it is worth in the way that you put the question; I cannot say what it is worth in the market. The value of goods, or any property, is not necessarily what they will fetch in a fair market. I have seen the time when I would give my watch for a dinner, but not today, so with a fair market.

Redirect examination.

88 In considering the value of adjacent shore lands in answer to the counsel's question I give the value as it stands now; with the river as it is, I have to take that into consideration in giving the values of adjoining shore lands just as much as I did in

giving the average value of the bed of the river; the river has its effect upon the adjoining land just as much as the adjoining lands have their effect on the river, proportionately, and all these things are elements that go into the question of the value of the land. In my experience I have found that the fee, the ownership of the fee of the land was valuable to adjacent lands, and in that vicinity there is a demand for waterways and canals and there have been large expenditures just below Hamburg Street in dredging the river deeper, to make it more easily navigable and useful; my impression is that the bed of the river to Hamburg Street is rock and just beyond it is clay; it is a growing region around there with a great many railroads and large business interests increasing; there has been more activity in that part of the city within the last few years than in other parts; there is a demand in that vicinity for waterways.

VAN HORN ELY, sworn for C. E. Appleby, testifies:

I reside in the City of Buffalo and am in the real estate business; in the course of that business I have bought and sold largely in the City of Buffalo for myself and for other people so that I am familiar, generally, with the values of land in the City of Buffalo, and with waterways and water channels.: I am familiar with the land in the City of Buffalo from the Indian Reservation Line, near Hamburg Street, to the City Line, and the purpose for which it is used, and its market value. Assuming that there is a right of passage on
 89 the part of the public by boats in the waters of the river, and that the fee belongs to an individual, and all rights in the stream are private rights, and that there is simply the right on the part of the public to use the stream for the purpose of passage, as a highway, in my opinion the value of the bed of the river between the points named is about \$2,000 an acre; if there were no rights of passage on the part of the public, the ownership of it involving exclusive control of the stream, with the stream there, I would say that the value was about one-third more. I know that there is a demand for waterways, ship canals in the City of Buffalo in the vicinity of the property in question, that there have been sales of land, and the owner then excavated canals and ship canals for the purpose of making waterways so that in order to get those waterway: the purchaser added the cost of the excavation to the cost of the land, and that such demand still continues; this is a growing section of the city; increase of manufacturing establishments requiring water fronts, and water fronts, water privileges and dockage are useful, and there are railroads that are desiring to cross the stream, and put abutments in the stream, there is the one connecting with the Lackawanna Steel and Iron Works, where they desire to put an abutment upon the bed of the stream; I have heard it so stated, and that the privilege of putting in an abutment in the stream greatly diminishes the cost of a bridge over it, I have seen it so stated, I don't know the amount stated, but know it would make a difference because I have had experience.

Cross-examination.

There is more of a demand for waterways in South Buffalo than in any other part of the city; they use waterways where they are navigable for business purposes; in some cases the owner of the land where these waterways are constructed owns the adjoining land; I don't know as I know any cases where they do not own the adjoining land; I was speaking of the Lehigh Valley in particular; the Lehigh Valley bought a large farm out there and constructed canals in it and that is what I mean when I speak of waterways being constructed and laid out in South Buffalo; the Lehigh Valley own the shores of these canals where it made the excavation; the canals themselves, probably, would not have been constructed if they did not need them; possibly they might be of some value to the Lehigh Valley if they did not own the shores for some future use that they might be put to after it was once constructed. I never heard of a man constructing a canal unless he owned the adjoining shore; if he did not own the shore he could not make very much use of the fee. I should hardly agree that as an abstract proposition, if the ownership of the shore is separated from the ownership of the water, the waterway is of very little if any value; the waterway even if I do own the shore would have a value beyond question; the right of ownership to prevent the use of the ground for any other purpose would be one element, I should say. In the case of the Buffalo River it would be worth very considerable in my estimation, because it is a wide river in places and many railroads have crossed it, and other will probably in the future; streets also will be projected across it; I assume that the owner would not have the right to exclude people from the waterway, but he would from the use of the ground or anything that might rest upon the ground under it. I stated the value of the land under Buffalo River to be about \$2,000 an acre, not the right, the value of the whole. In making up that value is not only the right to exclude people from building on the bottom, but the right to permit them to do so; to sell that right to them.

Q. If they have that right, if the owner of the shore has the right to construct in front of his premises out into navigable stream to deep water, then the ownership of the fee, so far as that is concerned, would be of no value would it?

A. That element would be eliminated, of course, if that didn't exist.

Q. And would be left to cases where the railroad company, for example, might want to put piers in the river?

A. That would be a fair example. I have understood that it is the policy of the public not to allow any more piers to be put in Buffalo River. Assuming that this is a navigable stream and that the water must continue to flow over the bed of the stream, as it has in the past, I should say the land was worth about \$2,000 an acre, or in other words about two-thirds of the value of the surrounding property. I could not separate the possibilities of the future from the value of the land. I can't see but that it has a future the same as

any other real estate, any other property, under water which may be reclaimed. I do not mean that the land may be reclaimed by the abutting property owners, but by the present property owners. In making up estimates I take into consideration the idea that the stream may be diverted from its present course. When a man lays out a highway and lays out lots abutting on that highway and sells off all the lots, retaining simply the bare fee of the highway, it has a value of about the same character and making as the bed of the Buffalo River. I should say it is worth still less than the land in the highway. What the market value of land in Buffalo River in its present state would be I couldn't state.

Redirect examination.

It is proposed, and an act of the Legislature has been procured, to authorize the straightening of Buffalo River and to run its waters in another course from what it is now, I understand.

Q. And that there is a proposition to exchange the land under the bed of Buffalo River for other land?

Objection. Objection sustained. Exception.

A. The land under Buffalo River would be valuable to adjoining owners, so that people desiring to have land near it, or upon the borders of it, might be willing to buy the ownership of the land in front of theirs to add to theirs.

Q. Do you remember the fact that where the city ship canal terminated there was a canal that had been excavated by Adams and Moulton that ran from the City Ship Canal to the canal excavated by the Lehigh Valley Railroad Company, and that the canal as thus excavated was sold by Adams and Moulton to the Lehigh Valley Railroad for a large sum of money, that it brought a large sum of money; just the land under water, with the water that flowed into it from the public waters?

93 CITY'S COUNSEL: I object to that as incompetent, irrelevant and immaterial.

Objection sustained. Exception.

JOSEPH BORK, sworn in behalf of C. E. Appleby, testifies:

I am a resident of the City of Buffalo; I am in the real estate business and have been for 45 years. I have bought and sold for myself and friends large quantities of land in most every section of the City of Buffalo; I have owned some land on Buffalo River between Hamburg Street and the City Line; am acquainted with Buffalo River between those points. I have known it some time and am familiar with the land in the vicinity of the river. In my opinion the average value of the bed of the river is \$1,500 to \$2,000; that is assuming that there is the right of passage on the part of the public. I was going to explain what I meant by saying "the right of passage." I don't know of any chance for passage, and I don't think that I would make any difference in my valuation. I know as a fact that there is a demand for ship canals and waterways in the City of

Buffalo so that land has been bought and excavated for the purpose of making the same.

Cross-examination.

I have always believed that the river was a public highway, I have bought large tracts of land and laid them out in streets, etc. I laid out a great many miles of streets; in quite a number of cases I sold all the land that fronted on the streets and retained the fee of the street myself, in that case the ownership of the fee of the street would be separated from the ownership of the adjoining land, and

I understand that the ownership of the Buffalo River is separated from the bed of the river.

Q. So far as the question of the nature of value is concerned, isn't the case where you retained the private ownership in the street with all the abutting lots being sold, practically the same as the ownership of the title to Buffalo River with the shore line owned by different persons?

A. I should always regard it so. The nature of the value and character of it would be about the same in one instance as in the other.

Q. Assuming that the facts are that this is a natural water course, and that the water must continue to run over it in the future as it has done in the past, how is it of any value to the owner of the bare fee?

A. Well, as a street would have been to me; if the City wanted to pave a street or sewer it or anything of that kind, I understand unless they owned the fee that they couldn't make these improvements. Of course there are ways in which it could be done, which you lawyers know about better than I do; but when the railroad company wanted to lay 50 or 60 miles of tracks in the City of Buffalo they found they didn't own the fee.

Mr. Appleby rests.

THEODORE V. FOWLER, sworn for the City, testifies:

I live at 89 Hodge Avenue in the City of Buffalo; my place of business is on the Abbott Road; the Buffalo Chemical Works; I have been in that business at that place for 27 years. I know the Buffalo River; I never inspected the river all the way down; I

know, generally, its character; I know its character as far as the Atlas Works; we have used Buffalo River ourselves to bring up the raw material for a great many years; until within about five years we had all our material loaded in New York and brought up by canal and towed up to our works by steam tugs; boats have come there for between 18 and 20 years; we have had from 20 to 25 boats a year, I should say for 18 or 20 years; we have not brought any up for about five years, but for 18 or 20 years before that all of our raw material was brought up by canal, it consisted of brimstone and nitrate of soda, peroxide and sulphate of potash, almost all came to us by boats; Western Transit people did the canal business for use. After the Lackawanna built the bridge across the river there was a bar right in the center and a bar formed right across the river and for two seasons we dredged them out and that didn't

pay. It was cheaper for us to bring our freights up by rail, and we discontinued using the river, and during the past four or five years we have not used it. If that bar was away we could use it just the same. The only one that used the river to any extent besides ourselves was the Genesee Oil Company when they were there; their works are not there any more. Our works as show- on this map are located at the corner of Lee and Prenatt Streets, on lot 194. The Genesee Oil Works were located near Babcock Street shown on the map. I do not remember how long ago it is that the Genesee Oil Works burned; they shipped oil; they loaded their oil in flat boats and ran it down; they were not canal boats, but some kind of flat boats or scows, or something of that kind; they ran them down to

96 Buffalo and loaded on lake boats and shipped it west. They did not use it a great while before they went out of business;

I do not believe more than one or two seasons. It was more than five, it must have been seven or eight years ago that they were there; had their works there; there were docks on the shore; the Genesee Oil Company did not have docks, they just ran a barrel rack out so they could run their barrels down and load them at about this point. I think they did load them on our property; had a runway across and loaded it just above; the Atlas Refinery is about half a mile above our works, lots 198 and 199, shown on this map. I do not know whether they used the river in connection with the business, I think they tried to use it, but at that time it was a small channel, years ago this was; now it is changed for some reason; this used to be the main channel on this side. I don't know what changed it. The river has worked a new channel for itself through that part of the territory. I do not know of the use of the river for other craft or anything of that kind. Below us on the river and above Hamburg Street are the Schoellkopf people, and the Union Iron Works; I do not know of their using the river; I have always understood that they did; I supposed they always got their material up there on big lake boats; my knowledge of the river is confined largely to our own business.

Cross-examination:

When canal boats came up to our place they came up the canal; I suppose by the Erie Canal to Buffalo; they came below Hamburg Street and then up the river until they got to our place; none of the boats used the river above our place; we had no occasion; 97 boats came to our docks and unloaded. The D., L. & W. have a bridge and that bar formed right across the river; there is a pier there in the stream and the bar formed there and you can't get across. Two seasons we dredged that out, but it was too expensive so we brought our stuff up by rail; if the bar was away we could use the river now; there was no bar when the Oil Company used it. I am not specially familiar with the river above our place, never had occasion to go there or to interest myself in it.

Redirect examination:

The depth of the water up there is somewhat dependent upon the level of the water in the lake, the low water in the lake did not cause our failure to reach our dock as much as the bar, because we tried it many times; we even waited two or three days for the wind to blow down the lake to give us all the water we could get in that way still we couldn't get across. Of course if the wind was blowing up the lake that would naturally make it lower. The change of level is not dependent upon the winds, but rather upon a change in the level of the lake that takes place in cycles, some long periods of years where it raises and then falls; I don't know anything about that.

BAYARD T. COUCH, sworn for the City, testifies:

I live at 911 South Park Avenue; I have lived there about 12 or 15 years, before that I lived at 89 Plymouth Avenue; one of my businesses is glue manufacture; our factory is at 953 South Park Avenue,

I think that is shown on the map; it is on Cazenovia Creek, on
98 South Park Avenue above the bridge crossing Cazenovia Creek. I have been engaged in business here since 1882; I know that steam yachts have come up as far as Seneca Street, several of them kept there for a long while. I have watched the river ever since 1882, but as to the depths I couldn't exactly say. These launches that I speak of run up there from the lake; they were steam launches, called steam yachts—fair sized yachts. They would go up to the Seneca Street bridge; they kept them tied there for years; that is, they were moored there, and used to run from the lake. I should think there were three there at one time; I know there were. They were used as occasion might require; the yachts were not always there, weren't there every year, because they were not owned in that vicinity. I don't remember just how frequently I have seen the yachts up there; I know they were there for several years; I think they were there last up to last year, I think I saw them there last year. They put a new bridge over Buffalo River at Seneca Street last Spring, and they drove piles there; they brought the pile driver up the creek; they did not tow it up because they couldn't get any engineers to run at that time; it was brought up by horse; I think just the boat came up, and they put the pile driver on afterwards; I didn't see how they took the pile driver away, I couldn't answer that question.

Cross-examination:

Billings' son-in-law owned one of the yachts; he lived out there somewhere, I think out Seneca Street. I couldn't just tell you the length of any of the yachts; I never measured them; the yachts were different lengths; I should judge from 20 to 35 feet
99 long; they were covered; they had an awning over them, a covering I couldn't say they were awnings, but they had a covering. I know one of them had an awning on, and I think the other was wood; I don't remember just exactly. I think they were used mostly for pleasure purposes; they were left there; they were

ted there. I never rode on any of them; I heard they ran to the lake for carrying passengers for pleasure on the lake from the creek. I think they were in use two or three years; I couldn't say how many times I saw either of them in actual use; I understood they were used two or three times a week.

Recross-examination:

I have seen these yachts running up and down the stream, they were steam yachts. I have often seen the yachts. They simply brought the flat bottom boat up there and put the pile driver on it after it got there. I am unable to tell you when or how often the boats—yachts, ran on the creek because I am not there very often. I should say the boats were there three or four years, some of them were there that time, not all of them, I can't tell just how long any one of them was on the river.

WILLIAM H. NEWERF, sworn for the City, testifies:

I live at 21 Pamona Place, Buffalo, that is in what is called South Buffalo; I have lived in South Buffalo about 48 years; I have been acquainted with Buffalo River almost all of that time; ever since I was old enough to roam along its banks. I have lived there all my life.

Q. What in the early days, if you know, was the use made of Buffalo River or Buffalo Creek, along the waters of it?

100 Objected to as immaterial. Objection over-ruled. Exception.

A. As long back as I can remember the river has been used for commercial purposes; the lower part, what I call the lower part of the stream; up as far as the junction of Louisiana and Ohio streets, in my boyhood days was used very similarly as it is today vessels loading and unloading commodities, that is from the lake up; and in after years and during that period, that early period of my knowledge of the stream, the stream was used, and so far as located within the limits of the City of Buffalo for the purpose of floating down logs and bringing down wood on rafts. In after years the commerce of the stream has been extended until it reached a point for canal boat navigation, a point—directly south of the property of the Standard Oil Company, near the junction of Elk and Seneca Streets, by canal boats. The Standard Oil Works had a very large refinery there, and the Schoellkopf people had a large plant there; the General Chemical Company had a very large plant there for the manufacture of chemicals, and a great deal of their products, raw material, was brought there on canal boats up to their docks. That has been in operation for the past 12 or 15 years. The Union Iron Works were on the river a great many years ago, away back in the '60's and used the stream then for unloading iron ore, lime stone and such products necessary in their business. Those canal boats were towed up stream by steam tugs, up to near the junction of Seneca and Elk Streets. I have seen steam craft going up the stream in the vicinity of Elk and Seneca Streets

very many years ago towing up flat boats; I don't remember
 101 seeing any above the junction of Seneca and Elk Streets, but
 in the vicinity; it was very customary for people living in the
 flats to take three or four scows up into the country and build rafts
 and pile their wood onto the rafts. In those days they all used wood,
 and would buy potatoes and such things and bring them down on
 the rafts. The logging ceased a very many years ago; 30 or 35 years
 ago or over. The river below Hamburg Street at present, and for
 some years past has been used very extensively for commercial pur-
 poses. The largest lake craft reach a point near Hamburg Street, and
 have—a great many years; they go up to the Union Iron Works in
 that locality; the largest lake craft reach the river at that point; they
 vary from 200 to 400 feet in length possibly not 400 but 350. I
 don't know exactly, but think the largest craft running. Commerce
 is very extensive. That portion of the stream is almost entirely oc-
 cupied by elevators, warehouses, coal and lumber industries. This
 stream has been a natural water course during all the time that I
 have known it, and the water was deeper at some times of the year
 than at others; when there are heavy rains, frequently during the
 Summer, it will raise three or four feet; in the Fall during the times
 of freshets it goes over the banks. I think I know the value of land
 in the neighborhood of the river; there are no dams or mill races or
 anything of that kind in the course of the river within the city limits.
 I know of land being bought and sold in the neighborhood of the
 river, and have owned land there myself, or had an interest in it.
 In my judgment the value of the land constituting the bed of Buffalo
 River, between the Indian Reservation Line near the foot of
 102 Hamburg Street and the easterly City Line, that is the land
 in the bed of the river, under water, in the condition in which
 it is, it seems to me has very little value. The value in my mind is
 very nominal. I shouldn't want to give much for it. If I wanted to
 buy a law suit, and get possession of it, I wouldn't give over \$1.00 an
 acre for it.

Q. No, they don't want it in that shape. We want the value of it
 as it is there, not in connection with a law suit or anything else; just
 the value of the land?

A. In my judgment it is worth about \$1.00 an acre.

Cross-examination:

I have no land at the present time on the stream; lot 16 is put down
 as mine. I don't own it now; I have owned property up there, but it is
 sold. My land now is just above the Seneca Street. My wife owns a
 little piece adjoining the stream up here; at times we are troubled a
 great deal with water overflowing there in the creek; that does not
 have anything to do with the value in my mind; I take a consider-
 able interest in having this river straightened; I would like to see it
 straightened; it is problematical whether it would improve all the
 land along the banks a good deal to straighten it; it might improve
 some of it, and some of it might be injured. I think it would be an
 improvement to the territory generally. I don't belong to the Asso-
 ciations there that are favoring this, pushing it; I have belonged to

that Association, but not at the present time. I am not on any committee that is interested in pushing this thing. I know of
103 some land in the City of Buffalo that I would not give \$1.00 an acre for; I don't know of any that I can buy for \$1.00 an acre. My wife has a piece of land on Seneca Street near the river. I don't know how much she asks a foot for it; I know what they ask for some of the land along the river. Right in my vicinity here, near the river, within 200 or 300 or 400 feet of the bank, that is land that is overflowed by waters from the creek, they are asking from \$15.00 to \$20 a foot front on streets, with all improvements excepting pavement; within 300 or 400 feet of the creek. They filled that land in and made the land high and dry, that did not used to be a part of the bed of the creek, they filled it; some of the land was about 10 to 12 feet above the normal height of the water and they raised it up; they are building houses along there now. If I were going to buy the land I would not want to chance over \$1.00.

Q. You base your price on the chance of a law suit?

A. I don't know how I could get possession, unless——

Q. The chances of a law suit, that element enters into your estimate?

A. Yes, sir; I wouldn't want to take chances of buying property unless I could use it. I don't think that I would want to buy unless I could get riparian rights under the stream. My values are placed on the assumption that this is a public highway. I would not change my opinion unless I could get the rights to all the land adjacent to the stream.

Q. Then the question as to whether it is a public highway
104 or not a public highway makes no difference in your mind?

A. Well, if the element of a public highway entered into it, even if I could get the adjacent rights there, certainly that would be an element in fixing the value, if the public had rights there that I couldn't obtain under purchase.

Q. Assuming this is a public highway, you place the same value on it as you do assuming that it is not a public highway, leaving out the question of riparian rights?

A. Providing, I say, the difference is such that I can retain all the rights in a certain amount of land bordering on the stream, leaving those things out, the riparian question does not make any difference. Whether it is a public highway or not, I think it is worth just as much as a public highway, as it is not a public highway. The riparian rights, if I had those, I think it would be worth very much more an acre. I mean by riparian rights, the rights that owners have adjacent to the stream, the right to build docks, unload vessels there, build railroad bridges and piers; all the rights the land owners would have on the banks of the river; that the owner has the right to build docks, and to dredge, and to put piers in the stream, etc., that is what I call riparian rights, and if I had these I don't think it would be worth as much as the adjoining land, that is, don't think the land under water would be worth as much as the adjoining land; how much less it would be worth would be a pretty hard question. I don't know what it would cost to put the stream in such a physical condi-

tion that it might be necessary to make it of use. Building docks and dredging improves the value of the adjacent land as much as
105 the land under water; improves the value to the extent of all the improvements you make; taking the adjacent land not under water, and the land under water before those improvements are made and they would be worth about the same. If I were buying to the center of the stream I would expect to pay as much for the land under water as for the adjacent land. I think I know the value of land along this stream as it stands now, without any docks on it; it varies in value; I know of several railroad tracks there; for instance, along here where the Lackawanna crosses they have a narrow strip along the river. In my opinion it would depend whether it would increase the value of the land a good deal if that river were turned away from there and gave them more vacant land. I do not know of the bed of the stream being sold anywhere; I never knew of the sale of the bed of a stream, only where the bed of a stream has been changed or where nature has changed it. I know where land has been sold years ago where today it is all farm land, and that land has been sold, that is, just in with the other land they paid so much for the whole thing. Just as much for the bed as for the adjacent land. The stream above Seneca Street varies in width, about on the average below water 80 to 120 feet. What I was saying about the large vessels and everything going on in the river was all below Hamburg Street; no large vessels came above the Union Iron Works, they dredged the river out there sufficient to admit of large craft coming up to the Union Iron Works; it is near the foot of Hamburg Street, and above that these canal boats that I have mentioned. I have been away
106 a good deal this Summer and I don't know as I have seen any canal boats go up there this year; last Summer they went up to the Chemical Works; I am sure I saw them unloading at the Chemical Works last year; I know of them running up there for a good many years before that, as long as the plant has been running there, 12 to 15 years, I have observed the river carefully. I live out in that direction and cross it every day at Seneca Street and Abbott Road. I have no occasion to go up or down the creek only as I take a pleasure walk. I have not been along it within a month or so. This Spring during the flood period I went over there; the adjacent land is not flooded every Spring; it was flooded this Spring. I am familiar with the Hamburg Turnpike where it crosses the river. A few years back the Turnpike didn't run absolutely straight to the river; there was a turn. Then they changed the location of it so it ran up to the bridge. I think there was a turn in it near Louisiana Street and Ohio Street a portion of it was abandoned and the course of it somewhat changed by the superintendent of railroads and canals; it never ceased being used. My estimate of value there is not on the assumption that the bed of the river can never be used without law suits; not as an individual, only as every individual has a right to its use and it is for that use that I am assuming it to be worth \$1.00 an acre. I know exactly how long the river is within the city limits; about 8 or 9 miles I should judge; I don't know how many acres there

are in it or anything like that. I mean to say then that if I owned the bed of that stream I would sell it for \$1.00 an acre, under the conditions as it stands today; as I think the conditions are. I would

not sell adjacent land on the banks of the river for the same
107 price. No, sir, I would not. I would want several thousand dollars an acre, according to location, its business adaptability;

it is quite valuable along the stream; it runs into the thousands all the way up and down the stream. I have no recollection of ever having bought acre land with the streets plotted out, not on the bank of a stream. I have in other parts not on the banks of a stream. I have never bought any land with streams in it, or known of purchases of that kind of land where there was a stream running through the land that was bought. All the purchases I have seen made have been on one side or the other of the stream; they did not go on both sides; bounded on one side, and that was frequently so on this particular stream. The city ship canal has been extended into the Lehigh Valley system of canals, that is the only one I know of. I don't know who did it, whether the Lehigh Valley or the city; large vessels go up their canals. In buying that land of the Lehigh Valley and putting canals in it, in my opinion the canals would be worth the value of the land plus the cost of the canals, if the land could be utilized for a business purpose, if it could not be utilized probably it would not have so much value. If we couldn't use the land and water together, whether they would be worth so much separately as they would be used together would depend on conditions; they might change their method or manner of their business and do a railroad business instead of a water. Large boats come up here to Hamburg Street and they find it to their advantage to use the land and water together; and such property, dockage property they call it, is worth

very much more than inside land. I have not bought any

108 dockage property or sold any; my knowledge is only a general knowledge of it. I know of dockage property that is held for

\$1,000 a front foot; along there west of Hamburg Street; just below Hamburg Street, and the same land not on the river, inside, can be bought for \$50.00 or \$60.00 a foot, so that nearness to the water and a frontage on the water, with the right to build docks, having access to the water, and the navigability of the stream makes that difference in value. Whether it would be an advantage to extend many of the streets between Seneca Street and Hamburg Street, which run up to this stream, would depend a great deal on what manner of bridging was employed there. I think it would be an injury if they put in any more permanent bridges across the stream. Putting permanent bridges on the stream is injurious. The stream is needed for a natural water course and those constructions would be a hindrance. The most desirable thing is to allow nature to proceed in its ordinary way; by putting piers in there you are obstructing the ordinary course of nature; the stream being crooked now obstructs the flow of water somewhat; if straightened it would be more readily navigable. In my estimate of value I have considered the question of exchanging the bed of this stream for other land near by; I have put the value on it just as it stands today I have considered in my estimate the

chance of exchanging it and what value that chance or possibility has. It depends altogether upon whether I own the land, what I could do, and what could be made. I have taken it into consideration; I gave it no value whatever on account of that possibility of exchange. My view of it is simply this, if I own land on the

109 bank of a stream and the course of the stream wants to be changed to better the general condition, and I give away two acres of land and I get two other acres of land for it up in some other portion, that is an even exchange; no benefit, only general benefit; in taking a long stretch, along lot 192, I would assume that I was going to exchange all that land under water for a like amount somewhere else adjacent to it, or have the same water facilities; certainly with the same water facilities as that. In speaking of the value of land under water, I think that the public have a right to land and water both, because they would not use the water unless the land is under it; if the water is taken off the land I think the public still has the right of passage even if the water is all taken off, and my values are placed on that assumption too. When I speak of commercial purposes above Hamburg Street, the only commercial purposes of any section that I know of, that the canal boats go up there to the Chemical Works; I have seen flat boats go up to the Chemical Works, about to Seneca and Elk Streets; years ago there were more of them than in the past 8 or 10 years because the water was much deeper. The bed of the river is a gravelly bottom; gravel, sand, etc. The stream has been gradually filling up the last ten years with sand and gravel that is brought down from the country. What I mean by navigable, is not only these canal boats, but small boats that could run on the stream, and did run on the stream the last 30 or 35 years to my knowledge; I think it must be about 30 or 35 years ago that they stopped rafting and bringing down wood there. I don't know that

there is any particular bar at the D., L. & W. Crossing at the present time. I haven't been there and noticed it this year.

110 No, sir. Some four or five years ago I went up the stream in a steam boat and know it was there at that time. At the present time at Seneca and Elk Streets there is a bar there now at low water; formed by the last flood, came last year. That is the only point where you could not row a small boat.

Redirect examination:

I may be somewhat mistaken in saying that the portion of the stream used by the large lake boats is entirely below Hamburg Street. I understand it extended up as far as the Union Iron Works, that is some distance south from the foot of Hamburg Street. I have seen no boats unloading at the land marked D. P. and B. C. Rumsey. It was not frequently that these boats would go up the stream; they seemed to have certain periods of the year when they would stock up their docks with this material, and boats would go in there and discharge their cargo. I have seen three or four canal boats there unloading at a time, towed up by steam tugs. There are certain periods of the year when that stream is quite deep; certain times when you can navigate in ordinary steam tugs, canal boat or even a good size

schooner; in what I would call times of flood—any time after a heavy rainfall when the water raises 5, 6 or 8 feet in the stream, not necessarily going over the banks, that happens not infrequently during the year; if it happens to be a rainy year why it happens very frequently, in the fall and spring months and in winter. There is very little difference. I don't know just what difference between the level of the water in the canal as compared with the lake level.

111 When the stream is as high as I have mentioned from heavy rains the current is somewhat increased, but it isn't extremely rapid, not so as to make it difficult for navigation by steam; not nearly as swift as it is in Niagara River, it doesn't carry away boats that are tied up; when there are ice gorges; I have seen from my observation of the boats in that stream; I have seen greater floods from rain than from rain and snow together.

CHARLES L. GURNEY, sworn for the City, testifies:

I live at 27 Ashland Avenue, Buffalo; my business is real estate; I have been engaged in that business for 15 years; I am acquainted with the value of land in the City of Buffalo, and with the value of land in the neighborhood of Buffalo River; I understand what land is proposed to be taken in this proceedings; in my opinion the value of that land is nothing; I arrive at my conclusion from the fact that it is land under water, which cannot be utilized for any purpose.

Cross-examination:

I do not know how much land there is in feet or acres; I have no idea of the amount of acreage; I don't know whether it is 50 or 100; I don't know the length of the stream, except roughly; I have never been along the whole stream, I have been at a number of points in my real estate business from time to time; I have sold land near the stream; I don't think I have sold anything directly on the stream; lots at the foot front; I sold them at South Buffalo near Seneca Street; those different streets running up to Seneca Street; have sold for different prices a foot front, from \$15.00 to \$16.00 a

112 foot, near the river at Seneca Street, about where Mr. Newerf mentioned; I sold them on Sage Street and Avon Place; those are the same that Mr. Newerf mentioned—the Newerf tract. I have never sold land or bought land fronting on the river; I never sold the bed of a stream anywhere; I know what such property would sell for.

Q. If you don't know of its having been bought or sold?

A. I am giving my judgment.

Q. You don't think any has ever been sold?

A. No, sir. I have sold land adjacent to a stream, along the banks; I have never sold to the middle of a stream; I have never sold so as to include the stream; I have never had any of this experience; I don't know whether they include the bed of the stream when they sell by the acre, or don't. If they sell to the middle of the stream they do not pay the same for the bed as for the other; I don't know of any sales of that kind being made; I never heard of a sale of that kind

being made. In placing this value of nothing, I assume that they are taking in this proceedings the bottom of the river, the land under water and I am placing my estimate on the assumption that it is a navigable stream, and a public highway; I so understood that is the situation. I have assumed that it is a public highway in making my estimate of value. I have assumed that, at the same time, the riparian owners have the right to build docks into the stream and put in piers and things of that sort; that these riparian rights go with the land; I have assumed that these rights go with the bed of the stream; I don't know whether they go with the adjoining
 113 property; it wouldn't change my price if such were the case, one way or the other. If the owner there did not have the right to build docks, and to dredge the stream, it would not decrease the value of that adjoining land, along the river or any part of it would it decrease the value. I do not think that dockage along the river here at the foot of Hamburg Street is worth something, worth more than back from the river. I know what land is generally held at on Buffalo River near the City; I don't know what dockage property is worth along there, I should say \$200.00 or \$300.00 a foot; I know what property is worth just back of the river fronting on streets merely, within 200 feet of the river, it is worth from \$40.00 to \$50.00 a foot front.

Q. Well then what makes the difference in value between the dock property and inside property there if it isn't being on the water, being on the water and the right to build docks?

A. You can build docks on your own land if on the water.

Q. And go back?

A. Yes; but you cannot go out in the bed of the river.

Q. And divert the water there?

A. If you build it out into the river there wouldn't be any river left there. The river above Hamburg Street, up say half a mile, is from 100 to 150 feet wide, that is my present judgment of the average width; I don't know definitely. I mean to tell you that if I had a claim on 100 or 200 acres of land, I would be willing to sell that claim for nothing; I wouldn't give it away; I don't know as I would give it away; I wouldn't pay \$1.00 for it if some one else owned

114 it; I don't think that I would sell it for \$1.00; I would for \$10.00; I have never bought any; I have never sold any.

I base my opinion of value on the fact that the land is covered with water; assuming that it is not covered with water that the water were diverted, it would not have the same value that adjacent land has at present, not the same value as land running along the bank, if it were filled up and the same character of property. I have known of the Lehigh Valley purchase of land, and their digging canals near there; it depends altogether upon how well it can be utilized; whether the value of the land plus the cost of improvement is the value of that now, or whether it is worth more than the value of the land plus the cost of improvement. If it can be utilized for dockage property it is worth more, the adjoining property should be worth more if it can be utilized for dock property. I have not considered where this stream could be filled and straightened, or the chance of straighten-

ing the stream in my estimate of value nor of diverting its course; I have not considered that at all, but only the way I see it on the map. I have not considered the possibility of exchanging this land for other land. In my estimate of value the value of the land is somewhat based on the possibilities that it can be used for; vacant land has value proportionate to what improvements can be made. I have not considered the possibility of exchanging for any other land; by value of land I mean what it can be sold for, or what its earning capacity is; that is what makes the value of property; the possibilities of earning;

115 ing; the possibility of earning, the actual price. I make a good many exchanges in real estate, if I could exchange this land for land out of water I would consider it a very good trade for the owner of the river, and if that were possible it would not change my ideas of value there; it would not make this land worth anything in my opinion; I would not change it. My definition of a public highway is one not belonging to private individuals, one on which no taxes are paid, one which the public can utilize; I mean that I consider that they, the public, own all the rights in a public highway.

Q. You make no distinction between a highway where the fee is owned by one person, and the right of passage is owned by another do you, you make no distinction between the two?

A. Well, a public highway is a public highway.

WITNESS continues: I don't know that it is the case here that the public highway is owned by one person, and merely the right of passage is owned by the public. I don't happen to know of any particular case; I don't know whether it is so here or not. I have considered it as a public highway; it wouldn't make any difference, not a particle, it wouldn't make any difference to me who owned the fee of the land, whether the public did — not; if they didn't own the fee it would be worth just as much as if they did own all the surrounding property, but if they didn't then it wouldn't. I don't know what rights go with the fee ownership of land as opposed to an easement, merely, in property that is a public highway. I have not considered the

116 rights that go with the fee as contrasted with the ownership of an easement merely, so that I do not know what difference that would make in the value. In this particular stream I don't think that the right to build docks in the stream is a value; this particular stream I consider different from other streams; I would consider the right to build docks in the lake different from the right to build docks in this stream, that has some value; the river isn't broad enough so that the right to build docks has a value. I have already stated that the docks owned by the Union Iron Works increase the value of that land; it would increase the value of the next land if there were docks there and large steamers could come up to it; it would make a little difference to adjoining property; the adjoining owners have the right to build docks. I am assuming that anybody on this stream has the right to build docks on their own property; whether they have or not in the bed of the stream, it wouldn't add any value to it. I say the adjoining property owners have the right to build on their own property docks on the banks

of this river; it gives that land **greater value** than some land half a mile back that has not the same privilege; I don't think that it has the value of a dollar to build docks in the stream; it would close the river here; I don't think the right to dredge has any value; if I didn't have the right to dredge the stream my land wouldn't have any value; there would be no value. I placed that value assuming that boats could come up to the Union Iron Works. If the river was dredged in front of one particular piece of property and not further down, it wouldn't add to the value of the particular piece that had the privilege of dredging. I hadn't considered the right to build piers in there was of any value; I had not considered

117 that the gravel in the river had any value, nor the right to dredge; I had not considered that in my estimate of value. I didn't give the value of the river any benefit from the possibility of crossing the stream with streets or bridges, and didn't add anything to the value for that reason; I don't think that taking nothing from nothing would leave anything; I have never considered the difference in cost between bridging the stream with a pier and without; I don't know anything about that and have not considered it in my estimate of values. In my estimate of values what I did consider was, that the land could not be used which was covered with water, and therefore of no value; it couldn't be used for any purpose, I considered it land under water, and if in places the stream were too wide and they wanted to fill in and make additional land, for instance up here is a narrow strip along the Lackawanna, and supposing they wanted to widen that out 20 feet, I would consider that the right to fill in that 20 feet had value for them. If they didn't have the right to fill in and the man who owned the bed of the stream under water had the right, and he could control it, I would consider that right worth something.

Redirect examination:

I don't know of any use to which a highway, or the land in a highway, can be put by the owner of the bare fee, where it is disconnected in ownership from the abutting property. The case of the Buffalo River, I should say, is a parallel case, and the bed of the river is separate in ownership from the banks, and is of no value; that is what I mean to testify to. Those cases where I said in Niagara

118 River, and elsewhere, that the right to dock out is of value is where the State in the exercise of its sovereignty has granted the right to construct piers out into the navigable waters of the stream or lake.

Recross-examination:

I haven't considered what use the City wanted to put this stream to after acquiring it, or what possible use there might be for it.

Q. Didn't it strike you strange that if there were no use to which it could be put, and the City had all the rights in it, that the public still wanted to acquire it?

A. I know, of course, what this proceeding was for, but I was asked to testify to the value of the bed of the river, as it stands there,

which I am doing; I have taken nothing else into consideration, not the possibilities or what it might be used for; only what the bed of the river is worth. I have assumed that there was no use to which it could be put; I assumed that the public had the right of way on the stream, of the water.

WILLIAM HAMMERSMITH, sworn for the City, testifies:

I live at 1812 Seneca Street, in South Buffalo, and have since 1848—53 years, ever since I have been in this country, and have been acquainted with Buffalo River during all that period. In the early days when I first went there everybody used it who wanted to, fishing or rafting or boating; people used to use lots of rafts and boats down there; they would go up as far as where the railroad bridge is at present—the Philadelphia bridge—near the city line. Those

119 were rafts and small boats that went up there; they got the logs up there and took them down to the flats around Ohio Street and Louisiana Street. These people would go out there

and get them; the logs came from beyond the city line up in the country; that logging business continued until there was no more lumber; I couldn't tell you exactly how long ago that was, about 20 years. There were certain years, I forget now when, there used to be two or three boats out there every night, pleasure boats. I know of their going up there after fire wood; it was most all during the year; whenever I would go through there I would see them loading up; I cannot recollect whether it was in the Fall, or Spring or Summer; in the day time I wasn't much to home; some of these pleasure boats, I guess, went up there 12 years ago, that is my recollection; I have seen pleasure boats, scows, etc., there since 12 years ago; I have not seen these pleasure boats, these little steam launches, up there since 12 years ago; I have not been to home much; they would go up further than the Seneca Street Bridge, these little pleasure boats tied up at the Bridge; I seen them last year, the little pleasure boats, last year and year before last; three or four tied up at the Seneca Street Bridge. I have seen them running for the last 30 years steady, these pleasure boats; the other kind of boats, that stopped going up there some 12 years ago, were bigger boats, steam yachts. I seen canal boats there 50 years ago; until about two months ago—three months ago; I couldn't tell how frequently I seen them off and on, but a person doesn't pay no attention; if they have anything to do there they would fetch out the boats, these flat boats, I should call

120 them something like canal boats, flat boats—had a pile driver, on, sometimes they have been taken up by horses as they would on a towpath, and other times by steam. I own some

land up there and always did; it is situated at 1800 Seneca Street; the land along the river is at Sage Avenue; shown on the map; this used to be my land right here to the creek. In early times my father owned the farm out there, this is all our property; it is all through here (indicates on the map), and then we had a strip through there (indicates on the map), that is on both sides of Seneca Street as shown on this map. This used to be the George Masten farm, that I think is on lot 60. I recall seeing a survey made of that; Mr.

Emslie made it; Peter Emslie. I used to draw the chain where ever he wanted me to; well, with reference to the shore line, near the creek; when I would go up a little near he would tell me to come away. I carried it for Mr. Lovejoy along the creek.

Q. Did you ever know of any objection being made by anybody to the use of the river in the way you have described it?

Objected to as improper and incompetent.

Objection overruled. Exception.

A. No, sir, I never did. My father's property extended on both sides of the river; the river broke through there at that time; the creek in its natural state did not run through the farm.

Cross-examination:

(Witness indicates on map). The creek broke through somewhere in here, that is Cazenovia Creek; it is between what is now South Park and Cazenovia. The river above Seneca Street
121 doesn't fetch any stuff down the river, it takes it away from the shore and it fills up the shore. In saying that the banks are changing, I mean that they are washing. I am working up town and don't get near there much, but once in a while I go through there on Sunday afternoon or evening; I cross it on Cazenovia and South Park Avenue so I can see it from one end to the other. I can see to Bailey Avenue and when you cross Bailey Avenue you can see the iron bridge; you can see the creek right along there as plain as you can see the room here. You can see 1,000 feet each way; yes, sir, two thousand. Last year I went to different places on the stream. I went down and I went up as far as the City Line; I was walking around, looking, passing away the time; that was about four weeks ago. I ain't been around home much; used to be more at home; that is when I was a policeman; when a man is a policeman he ain't to home much under the old system; I am not still a policeman; I am a retired policeman; I am pensioned by the City; I work for the Columbia National Bank; I couldn't tell you who asked me to come up here as a witness; I don't know him and I couldn't tell you whether that is the man or not (indicating). I ain't interested in the matter at all. I have got 45 feet by 150 on Sage Avenue; it is a fact our cellar are flooded out a great deal by the river overflowing; it wouldn't be a great advantage to this section out there to have this river straightened; it is immaterial to me whether it is or not because it wouldn't do any good to straighten it; it wouldn't do any good. I don't know what all of those associations are advocating
122 straightening the river for; I have not considered that question; I am not interested in that; it will do no good unless they get it about 30 feet deep, if they did that the territory out there would be greatly benefited, but a man might give his home away then on account of the assessments. There has been a great deal of wind out there and in the papers about straightening the river. I have seen canal boats recently go as far as Seneca street; about three or four months ago. I call them canal boats; I ain't positive enough to tell you what kind of boats; it was a boat I should

say about 100 feet long, or so, I guess it is a scow. I know what a boat drawing waters means, but I am not boatman enough to tell you. I don't know whether the boat drew a foot of water or 50. I only saw one boat there this year. I think I have seen two or three boats there; I don't know anything about last year. I think I seen one there two years ago, at Seneca street. I guess it went clean up—whether it went up back of Sage Avenue or not, I think it was about four years ago. I couldn't tell how long a boat that was, I guess it was over 50 feet, I guess it was over 70; it went under the Seneca Street Bridge; I couldn't tell you how wide it was, it was perhaps 30 feet, 20 feet, a hundred feet long. I think they were driving spiles back of Sage Avenue, and they were driving some below Seneca street, but not at that time. Within the last two or three years I guess I did see more than one spile driver up there; I am not positive; I think I have seen two or three, but I am not positive. I don't know how they got there, don't know whwewther they were brought there in sections and set up or not. One of them I see this year, it was on a boat, I know the boat was not put together there; I

cannot tell you how many boats I have seen there within the
 123 last 12 years; I wouldn't swear within three or four; I don't know, there might have been ten, and there might have been two—might have been three or four, some where between two and ten boats I have seen there. I have not seen any canal boats there. I didn't see any canal boats at all on the river. I have seen lots of canal boats on the river. If you want to ask me why don't you say what part of the river. I have seen them loaded heavy down to the Chemical Works; I was not down there this year. I was down there, but I didn't look. I saw boats there last year, lots of them; every time I came there; I noticed boats at different times; I think I saw three unloading at one time last year; just last year; just as positive as I am of all the rest of things. I used to go there most every day last year. I was on a patrol wagon. There are docks right there by the bridge, not 20 feet away from the bridge. Sometimes I would come through the Chemical Works and sometimes through the bridge. I left the police force the first day of this year. Those pleasure boats were about 25 feet long, and 6 or 8 feet wide; I am not sure that they would draw more than a foot of water; some of them might have been 10 feet wide. This firewood that they used to bring down consisted of logs that were laying there; sometimes 4 or 5 logs in one heap; stuff that they had picked up along the stream; I guess the last was about 12 or 15 years ago; it was flood wood that they picked up along the stream. The last time I saw Mr. William Hard bringing logs down to his sawmill was between 30 and 40 years ago; there hasn't been any lumber there since; old Heacock used to fetch

down logs on the Buffalo River; he has been dead 30 or 40
 124 years; the logging stopped at that time, the trees had all been cut off up there. Cazenovia Creek comes into Buffalo River at the Park Road; it is not quite as wide as the Buffalo River; it is almost as large as Buffalo River is above that point; Buffalo River is a little larger. Cazenovia Creek at the point it comes into the river it about 250 feet wide, I should think above that it was about

120, 125, 150 feet wide, I guess for a mile or so it will average all along there 100 feet; then again up further it is perhaps 200 feet in width; it widens; Cazenovia Creek used to be deeper; both of these streams were deeper in those days above where they joined. I have seen boats other than row boats above Seneca street on Buffalo Creek. This pile driver was at Sage Avenue and small tugs.

JOHN J. GRIFFIN, sworn for City, testifies:

I live at 404 Richmond Avenue, Buffalo; I am in the real estate business and have been for about 20 years; I know Buffalo River; I think I know the value of land in that part of the city; I know of land being purchased and sold there; I know the land that it is proposed to take in this proceedings. I understand it is the land under water from the Buffalo City Line to the termination of the Buffalo Creek in Buffalo; the land under water; the land under water from the easterly City Line down to Hamburg street. In my opinion the land that is to be taken in this proceeding has not got any value. I say that because the land is under water, and it is a navigable stream from the City Line to Hamburg street, and assuming that that is a fact, the land under water has got no value, in my judgment. I understand it is a natural water course irrespective of its navigability.

125 Cross-examination:

My estimate is not based entirely on these two assumptions, namely, that it is land under water, and a navigable stream. I don't base my conclusions on that entirely; I don't base it on the value of the neighborhood land. I think I know the value of neighboring land there; I don't think the value of neighboring land cuts any figure in the value of this stream, because the conditions are not the same. I mentioned the fact that I knew the value of land in that vicinity; I mentioned that in reply to a question from Mr. Cuddeback; the value of land in that vicinity has very little bearing on the value of land under water; I don't know that it has any bearing; if the neighboring land there is worth \$1.00 an acre or \$10,000 an acre it wouldn't make a particle of difference in my valuations of the bed of the stream. My conclusion is based not only on the assumption, but on the knowledge that it is a public highway, a navigable stream; it is based on that fact. If it were not a navigable stream and not a public highway my conclusion would not change with reference to Buffalo River; it wouldn't change a particle; nothing could change my opinion of Buffalo River; even the facts that have been mentioned so far. If you take all the water out of Buffalo River there today, it has got no value; take the water off entirely of Buffalo River and in my opinion it has no value. If it were not a public highway it wouldn't be worth a bit more than if it were a public highway. I think I was last on the river last Wednesday or Thursday, when I crossed it. I have not been up or down the river for any distance within a year; I

126 have been on it at different points, for the last 30 years at different points, going a short distance wouldn't say that at any time I went from the City Line to Hamburg street, but during the past three years I have been at various points on the river. I didn't start off to put the same value on the land under water between the lake and Hamburg street. I don't mean to; I don't mean to put the same value below there, the conditions are altogether different. I don't consider there is any difference in value in the land under water below Seneca street and above it, none at all. I know generally what the plans are in connection with straightening the river; I know in a general way of the law permitting the making of new cuts for the river to run in, in the same general way; I know of the act permitting the exchange of lands.

Q. Did you have anything to do with the passage of that act?

Objected to by the City.

Objection sustained—exception.

I have never in my experience sold the bed of a creek; I bought land adjoining the Buffalo River,—2200 or 2300 feet—right up to Buffalo River, from Seneca Street on one side and from Clinton Street on the other and my deeds ran to the river; I bought 49 acres from Mr. Box for which I paid \$37,000, fronting on Clinton Street. I bought from Mr. Phister on Seneca Street, it was in 1884 or 1885. I bought from Mr. Phister on Seneca Street near South Park Avenue running to the Buffalo Creek. I paid him \$1,000 an acre. I think that was in 1888, perhaps. We ran a street through there from Seneca Street to Buffalo River, and plotted the land and since have improved it, and houses have been built. For the last 12 or 15 years this whole territory in South Buffalo has 127 been quite active—very active. Long before the steel plant was thought of; the prices were good before the steel plant was talked of; Seneca Street was paved with asphalt, and street cars were running to the City Line.

Q. Have you considered the fact that a great deal of this adjacent land along the river, and near it, would be largely increased in value if the river was straightened so as to take care of the floods?

A. I have always considered that purely problematical, I would have to consider the condition of the lake, and that is an engineering question.

WITNESS continues: I don't know how far it backs up; there has been a strong movement to get these improvements made; it was a belief that this would be a great improvement. I don't know whether it was general or not; I don't disagree with it because my knowledge don't extend that far. It was not a conclusion of mine that it would not be. I had an idea that the action of the lake at that point had a good deal to do with South Buffalo, and I have still got that opinion, but I wouldn't base that opinion as against an expert. I don't know how far up the river the water would back up from Lake Erie; I had a notion that it backed up to where the two creeks came together. I know what a public highway is. I think it is a body of water running the same as Buffalo Creek; it is

something for people to pass over, the same fashion as a street. I know very little about the rights in public highways. I have not considered those in my estimates. I think the right to dredge the stream, or fill in the stream, or build docks or piers in the stream, belongs to the owner of the fee. At some places I consider those rights of value, at other places I don't. In that river I don't think the rights would be worth a five-cent nickel. Taking the M. Tonner land on the map, which is adjacent to the Standard Oil Company land, which strip is very narrow, whether the right to fill in the stream, and change the stream to another place would increase the value of that land or not would depend entirely on what it would cost to fill that land in. In the first place you would have to build a retaining wall. I don't know how deep the water is. If there wasn't any water there it wouldn't be wearing the land away. That is the narrowest part of the stream, and usually in the narrowest part of a stream the water is deepest, it widens out quite rapidly until you get to the Standard Oil Company's land, it widens towards Hamburg Street. Assuming that that land at the turn here in the Standard Oil Company's land, that is the land under water, the water is only a foot deep, and they could widen it for 25 feet by filling in one foot, then the land under water would have some value, but I want to take into consideration the making of that valuable; it would have some value, it would have as much value as the adjoining land, minus the cost of filling it in. So they might in that way fill in a great many acres in the stream, if permitted; if the owners of the stream would permit it. The value of the land under water would be the value of the adjacent land, minus the cost of filling it, but my valuation of the land along there was not erroneous; I don't change my statement; I am — assuming that there is no point along the river that this filling could be done, for it is a fact that there are points where it can be done; my conclusion is not wrong, it might change my opinion. I am going simply and wholly on the assumption that it is a navigable bed of water, and the rights of a navigable river prevent the owner from filling it in.

129 Q. And allows the riparian owner to fill it in?

A. I don't think there are any riparian owners there.

WITNESS continues: Those things wouldn't change my opinion any in regard to Buffalo Creek, none of those things change it.

Q. The right to build piers and dredge making it deeper water, so that you could come up with canal boats and other boats, those are valuable rights, aren't they?

A. I don't see where there is any value attached to the owner of the bottom of that water.

Q. Aren't those rights valuable, the right to build docks and dredge the stream?

A. I don't know. Sometimes you find them invaluable; dredging is a very costly thing.

WITNESS continues: I know that at Hamburg Street they cut through the rock. From Hamburg Street down to Ganson Street was rock bottom and my recollection is that they paid nearly \$300-

000.00 to do that. I wouldn't say whether or not the river is a clay or sandy bottom. Above Hamburg Street I supposed that Buffalo Creek became a public highway. By the action of the water running over it and the navigation that occurred there. I think it

130 is a public highway and a navigable stream, that is the ground on which I base my opinion as to valuation, and the ground on which I base my opinion that it is a public highway is that the water runs down there. That is my own opinion

of the value of the land, not the market value. I mean to say that that is the market value of the bed of the stream at the present time, as it exists at the present time. The market value is based entirely on the earning capacity of the land, or anything else; a man's labor, or anything else, that is what the value of land is based on. When I bought this vacant land out there, which I have spoken of, at \$1,000.00 an acre, it had not much earning capacity.

When I bought it I made the earning capacity, that is the possibilities it had for being used for particular purposes; that is what made its value; as it stood it had earning capacity, that part of the town was the best truck garden property; all of that farm was good truck garden property; one side of the river, the southeast side, is all good land, all good truck garden property. From Hamburg Street up the Island, I should judge, it was mostly clay. I don't know much about the quality of the soil at that point, except on the other side of the river, the southeast side. We are away out

Babcock Street and the Lake Shore Railroad. From the Lake Shore Railroad to Hamburg Street the land is not used for garden purposes, it is used for business purposes, it is valuable for business purposes on both sides at the point on the map marked "Lehigh Valley Road 63" the Lehigh Valley has got docks and highways along the river, clear out to the lake almost. Assuming that I could

exchange the bed of this river for other land, and supposing 131 I had somebody ready to give me other land for the bed of the river, it most decidedly would have value in my mind.

I had not considered the possibility of exchanging the bed of this river for other land. If I owned the bed of the river it would have changed my opinion; if there were possibilities of exchanging it for other land; I don't say it would change my opinion, not as to the value, not a particle; wouldn't make the slightest difference; if I could exchange it for a like amount of land; nothing could change my opinion as to value. I don't consider any of its possibilities; if I had a man waiting there to give me the bottom of that river I would still say it had no value. I don't think my opinion is something different from the market value. I think my opinion and the market value are the same thing, or any other value. Assuming that making a cut 200 feet wide and 600 or 700 feet long damaged 10 acres of land \$10,000.00, if you put that same quantity of land back in the same condition as before it would increase the value of the land \$10,000.00; if it damages it that amount to take it away I presume it increases it a like amount to put it back. I know that property on the map marked "City of Buffalo 201." I understand the City appraised the damages to that land when making the cut.

The City bought the property from Captain Kelderhouse; I don't remember what the price was. The land for that cut was appraised by a commission; there were 13 acres of land in the island, they took the whole island. Assuming it to be a fact that the island left after making that cut would be worth nothing, I don't think it would increase the value of that land the amount that was deducted for damages if the cut were filled in again. I don't think

132 that was a case where the bed of a stream had big value. I think that arises from the condition of things existing there; if they separate that island from the main land it perhaps reduces its value somewhat; I don't know to what extent because there is very little means of getting to that island from one side of the river or the other, but if it had no value—that island of 13 or 14 acres—I don't know what reason the appraisers had for putting the \$13,000.00 or \$14,000.00 on it unless to make Mr. Kelderhouse a present of it. I say that island has a value. They don't make an award for damages because the property left had no value, they award damages for the land taken. There was talk of putting a municipal gas plant on it. Because that land is assessed, that is why I say it is valuable. It was not the damage resulting to that land from taking off the bed of the stream; they awarded for the value of the property. Assuming that that new cut is a waterway it has no value in my judgment. To put the land under water in the cut back to the other land would give the island the same value it had before. If they awarded \$10,000.00 damages for the amount of value it took off the balance of the land—as an expert, I would say that if they put the land back in the same condition as before the cut was made it would increase it \$10,000.00 in value; on the other hand, taking this island and adding the old bed of the stream on the other side would make it mainland, just as before; if the old channel was dried up and filled in. On the facts assumed, that adds value to the land. I don't consider all the isolated cases. I think that is the only chance to do with that. I have not forgotten

133 this island below here, the Buffalo Hardwood Lumber Company. My attention was not called to it; I can't quite place it; I know where it is; down where the Little farm used to be. The river has changed its course at that point and gone straight, so that has left the old bed of the stream there, the same thing could be done at lot 201. I don't know whether there are any more cases like that or not; I have not considered it in that aspect.

Q. Are you familiar with that lake that used to exist down near Syracuse?

Objected to.

Objection sustained.

Exception.

A. I have assumed that this is a public highway and the same fact, that it is a public highway, takes away the value from it and the owner of the fee or any individual. I define a public highway, where the public have got a permanent and continuous right to pass over a body of land, or a body of water, as in this case. I con-

sidered what rights would exist if the river was abandoned as a public highway. I said to you that if this stream was dried up and entirely off of it, and you owned the fee, your land would be valueless, even if it were not a public highway. Under those conditions I have known of sales of water-ways, where they were valuable; where people bought and paid for waterways where they were valuable, where they could be employed to some use. I have known of that taking place. At the foot of Georgia Street and Jersey Street that had great value; also on Niagara River, between here and Tonawanda, where they paid the State quite a large sum of money
 134 for riparian rights. The land that the Lehigh Valley has taken in Lake Erie; also the Steel Works, that is going to be very valuable. If the same rights existed in this river then it would have a like value.

Redirect examination:

I understand that in those grants of land that I have spoken of the State was the grantor and that the State give to the individual the right to dock out and construct wharves to a certain boundary, which was fixed as the limit of such construction; I think as far as 10 feet of water, to construct docks and everything of that kind. Nobody that I know of can give to the adjacent owners the right to stop up Buffalo Creek, or block the passage of water there. When I say that the bed of this river would be of no value in case the water ceased to flow over it, I mean that the river is depressed very much lower than the adjoining land; after you did fill it in you would not own the adjacent land to reach it. These are the things that enter my mind. One of the reasons that influenced my estimate of value was the fact that the owner of the bed of the river is not the owner of the upland adjoining; the second, the cost of filing it. Assuming that the owners of riparian property bordering on a navigable stream have the right to dock out to deep water, so as to bring business to his property, and that the bare fee to the bed of the river remains in some other person, that bare fee would have no value. In the case of the Kelderhouse property, to which my attention has been called, both Kelderhouse before, and the City afterwards, were the only owners, on one side of the stream, at least, and before the City acquired that property there was no
 135 such cut as the Counsel has called my attention to. My recollection of it was that the river ran down one cut; this cut that he pointed out here on lot 201 north of the plot of land or island marked "City of Buffalo," didn't exist at that time, as I understand it, and the property the City took was a certain number of acres of land belonging to John Kelderhouse, lying on the north shore of Buffalo Creek, and this cut made around that way.

Q. Now, assuming, Mr. Griffin, that this is a natural water course, the Buffalo River, and the water must continue to flow over the bed in the future as it has in the past, what then would be the value of the river?

A. No value.

Recross-examination:

I mean by a natural water course the same as Mr. Cuddeback described it; waters to flow for all time. Assuming that it was not to flow for all time, but to be changed in some places; my opinion wouldn't be based on such a supposition, if it ceased to be a natural water course, then it wouldn't have any value in my opinion. It makes no difference in my judgment whether it is a natural water course or not; a natural water course wouldn't have any value. I mean by the fee of ownership of land so as to deed it, give good title to anybody, or complete control of it, not only complete control, but complete ownership. I don't think that is of no value. There are various streets that run to that river; run right to the river and stop; there are only a few streets; few principal streets, that actually cross the bed of the stream at the present time. There is quite a distance from various points across the river. I have not considered whether, if that stream was abandoned, the bed of the river, as dry land, would have value for the purpose of extending those streets across it. I think you wouldn't have any right to abandon that stream. One of the considerations that influenced my judgment that it had no value was that the owner of the stream didn't own the adjacent land, if they did own the adjacent land the river wouldn't be worth as much as the adjacent land. If I were selling an acreage tract there, with the dry bed of the river in it, I wouldn't consider that as part of the acreage. If the bed of the stream were on a perfect level, and was as good land as the abutting land, then it would have some value, but you would have to consider the bed of the stream, or make it as good as the adjoining land to have the same value. The conditions that exist from the Standard Oil Company and the Chemical Works down to Hamburg Street are quite different from those that exist above those points. In regard to the depth of the water, only part of the stream would be available for filling in and the other for waterways; I had considered that, it made some difference in my opinion. There are different points in the river where it wouldn't cost so much; there are no places in the river from the City Line to Hamburg Street but would cost a great deal to fill it in. Mr. Box and Mr. Embry had to drive piles to preserve their land. The general action of the water was wearing away the soil. I don't consider the question of expense saved in putting in piles. If the water were taken away from the old channel to a new one; it is problematical whether the straightening the river would save a great many bridges in the future; I don't know whether it would or not.

GEORGE H. NORTON, sworn for the City, testifies:

I live at 533 Fargo Avenue, Buffalo. I am Assistant Engineer in Bureau of Engineering, and have been for about 12 years; I have been there nearly 13 years. I am familiar with Buffalo River, and with the lake levels. The level of the water in Buffalo River depends on the stage of the water, the amount of water running into the Creek, and the stage of the water

in the Lake. Ordinarily, in low water at this season of the year, the back water extends about to the Pennsylvania R. R. Bridge. That is marked on the map "W. N. Y. & P. Bridge." It is lot 7, and above that, I think, into lot 8; that is in extremely low water, and very often it extends back to the City Line. There is a change going on, or has been in the past, in lake levels—Lake Erie levels, they constantly vary, very materially change. There is a fragmentary record extending back to 1810 regarding the levels of Lake Erie. The United States Government, I think, have a complete record from somewhere about 1850. I can't tell the condition of things in 1850; 1838 was the extreme high water of which there is any record, and the water levels of Lake Erie have been reckoned. In 1838 they were approximately 2 feet higher than the mean level of the lake for a series of 25 or 30 years. The effect of that condition of things would be to produce dead water, back beyond the City Line.

The land is practically level away back a long distance; there
 138 is a slight slope to the bank. After 1838 the level went down; I don't know how long it continued to go down. I have no record between that time to 1860 available. I have seen it, generally speaking, between 1838 and 1860. There was a depression in levels; in 1860 the water was comparatively high, especially in 1862. The summer elevation being a foot and a half higher than the mean level. After 1862 the water dropped again; reached extremely low in 1867 and again in 1872. In 1867, in the winter months, the water reached a stage of about a foot and a half below mean water, and from then up to 1872; I will change that to 1870; it rose again in 1872, in the summer time; the water was about one foot higher than the mean level in 1872; after 1870 it dropped down again and then reached an extremely high point in 1876. It reached the low point in early spring of 1873; that low point was a foot and three-quarters below the mean level; in the summer of 1876 it rose about a foot and three-quarters above mean level. Such variations as those would have very material effect upon the water in the river; from 1876 that is the last date. The water fell, reaching low points in 1879 and 1881; then the water came up to high point in the summers of 1882 and 1886 water continued high. In 1880 the extremely low water; was about one foot below mean level, and in the summers of 1882 to 1886 the water was a foot and a half, nearly, above mean level; that is between 1882 and 1886 it had been gradually increasing, from 1886 it went down to the fall of 1889; summer of 1890 gave high water again, nearly as high, in 1889 it was about three-quarters and then the next summer went high, about a foot above mean level; in the early
 139 spring of 1892 it went more than a foot and a half below mean level; next summer it went up fairly, well, but the winter low waters continued to fall until in November, 1895, it reached extreme low point, a little over two feet below mean lake level, that is the lowest of any that I have given. So that in 1895 it was extremely low, since that there has been a slight raise, but at no time, I think in very few months, if any, has the water been up to mean level since 1895; it may have been in one or two of

the summer months. In the ordinary course of business, then I expect to have it raise from now on. When the water is high in the lake it affects navigation in the river very materially. In periods of high water these bars, and other obstructions to navigation in the river would largely disappear. Witness shown map, Exhibit "2"). This map comes from the Engineer's office. The names upon the map along the river are the names of the record title owners of the property abutting on the river. The map shows these names from Hamburg Street to the easterly City Line. The map also shows the bridges constructed over the river at different points; railroad bridges and highway bridges. The Union Iron Company has a dock opposite this property; the Chemical Works has one opposite this property, and various other owners have the same. These bridges and docks are structures existing in the stream now, adjacent to it.

Q. Do you know or did you ever hear in your line of business of any person demanding or receiving or claiming any compensation for the right to put bridges over the stream or to put those docks in it?

140 Objected to by defendant's counsel as improper and irrelevant.

Objection over-ruled.

Exception.

A. I never have.

WITNESS continues: The City has recently constructed a bridge over the Buffalo River at Seneca Street, nobody objected to that or claimed compensation for the right to put it there. The scow on which they put the pile driver when they constructed this bridge across Seneca Street was towed part way up the river by steamboat, a tug of some kind, but the main distance it was towed up by animal power. I know what the cost or expense of filling in low property is; it depends on the location of the land and the availability of filling. I have made a rough estimate of the cost per acre of filling for various depths of Buffalo River; I should figure a filling for a depth of from 10 to 15 feet; that would be exclusive of the deeper lower portions; that might be called the average depth, for where the Creek is shallow, 10 or 15 feet of filling for the shallow portions of the stream; basing that on the cost of what it would actually cost to get filling in there at the present time, the filling for 10 feet above that would cost about \$6,450.00 an acre, that would be filling 10 feet in depth; the idea being to bring the property up to the level of the adjoining land.

Cross-examination.

That estimate was made on figuring on bringing the filling in from outside. It could be brought from the southern limits of the City, or brought in by rail. Well, for teaming, available filling would be two or three miles away. Any earth filling, hard
141 material, any material, suitable for such purposes. I figure that I could get it outside the City limits; within the City

Line on the high ground. I figured 40 cents a cubic yard; I figured on the possibility of filling in with cinders, etc.; the slag from manufacturing; it is worth about the same to haul slag and cinders there. The City has paid 50 cents a cubic yard for cinders. The City has bought slag and paid more than that for it; crushed slag; at the Union Iron Works there are large piles of slag, great quantities of it. I didn't go there and inquire the price of it; I have known of the price of slag. I don't consider it in my estimate. That mountain of slag at the Union Iron Works has been increasing all the time, it is considered in the iron manufacturing business of that kind that it is desirable to have a place to put it, and vacant land adjacent to the works is desirable because it saves the cost of long transportation, therefore, to such a business as that a hole in the ground, in available shape, is valuable. That pile of slag has been there only a few years, and there is quite a pile. They will have dumping space there for a good many years. It is solid up 20 or 25 feet. They are disposing of considerable of it right along. They have either got to leave it in that dump or put it in a hole like this river. I don't know of any nearer place they can dispose of it than this river, except the dump. There is a large steel plant going to have the same thing out at Stony Point, about three miles from this river. I didn't get the cost of filling from the furnaces at all. I know something of what it would cost. I didn't ask what they would sell for in making my estimate; I didn't ask anyone what they would sell for. I knew what I paid in other cases for small and large amounts of filling, all kinds of filling. There are paved streets out there crossing the stream at several points. I presume that the river is available for dumping ashes and dirt from the City; also at Seneca Street, the bed of the stream if it were discontinued. I don't know whether they have filled in on the Hamburg Turnpike, near Buffalo River; using it as a City dump, or whether they have put in a great many thousand loads of ashes there. It is hard to say when I was up and down this river last. I have been up the river practically for several years—every day, and I have been over considerable portions of it this summer; some portions I have not been over. I based this estimate I have given in regard to the depth of filling on the amount of earth it would take to fill, according to that depth. I know the depth of the river there because I have measured it all the way, in some places it is quite shallow, and in some places it is deeper. From Hamburg Street down there was rock bottom, it has been dredged out there. At the Erie Elevator we have taken out rock. The largest vessels can't get up to the Union Iron Works at the present time, but they can some of the time. The large boats, boats carrying ore, go to the dock of the furnace. I think that is about the limit for lake craft, excepting harbor tugs. There is some rock above Hamburg Street, facing the Union Iron Works; lots 64 and 65; that doesn't interfere with navigation. That is the part that has been dredged. There is a channel dredged towards the Union Iron Works side of the river and the rest of the bed of the river is clay and sand, and gravel; sand and loam mostly. They have taken the

rock out below this point, some of the rock so as to make a
 143 channel for those boats I have mentioned. If the river were
 straightened it wouldn't greatly decrease the cost of bridging
 in the future. I think it would increase it. I don't think it would
 require very much fewer bridges. As a general thing, where they
 can't put abutments in the stream, it costs more to build the bridge
 than with piers in the stream, as a general thing; it is not always
 so. In the case of the South Buffalo R. R., it was stated that it
 would cost \$25,000.00 more to build a bridge across the river with-
 out piers in the stream than with the same. I made such an esti-
 mate. I have seen a variation of nearly 14 feet in change of level
 in Lake Erie. These levels I have given are for a monthly average,
 an average elevation for a month extending over a long period of
 years. That map was made approximately on a datum of lake level.
 I didn't make this map (Exhibit "2"). I make the surveys for a
 large portion of it from which it is reduced, and I have not com-
 pared it with my surveys in any way. A good many of the lake
 measurements I took. I didn't take those in 1838. I have had
 more or less acquaintance with lake levels since I have been in the
 Engineer's office, which is for 12 years. I have a great many times
 taken the levels of the lake, myself at various points. I have had a
 series of gauges established on Buffalo River, and have had gauges
 down here in the harbor; had a gauge established in the Hamburg
 Canal which was read every day for a number of years, for 8 or 10
 years. We have been constantly dredging the river and whenever
 there is low water we get into trouble with these very deep new
 vessels. We have to meet these changes in levels all over
 144 everywhere. The scow mentioned that was brought up to
 Seneca Street for driving piles is not the only one I have
 heard of being there; I have heard of other boats up there for the
 same purpose; and have seen other craft up there. The scow men-
 tioned was first taken up to Seneca Street sometime in December
 of last year; at time of low water; taken up again about the first of
 March; high water. They weren't able to get it up when there was
 high water; they couldn't tow against the high water. I think the
 first time it was taken up it was quite low; in December, that is
 usually the period of low water—November and December. I don't
 know how far the tug went with it. I can't swear. I know I have
 seen other boats than these two scows at Seneca Street and I have
 had good information of their being up there. I was told by the
 man that owned the scow. I didn't see them. I have seen yachts
 going up there, pleasure boats 20 or 25 feet long; I saw them there.
 I should say about three years ago. I think there was one there
 within a year or a year and a half, or within two years, that is as
 near as I can fix it. It was a cabin boat; I think it was either steam
 or naphtha, steam as I remember it, about 10 or 12 feet beam. I
 don't know of my own knowledge how much water those boats
 drew. The objection to those on the river has never been raised to
 my knowledge; that is all I know about it.

Q. You have known of a great many things done in the city
 without right that there are no objections to?

Objection by City.

Objection sustained.

Exception.

145 At the present time there is quite a bar in the river, a rather shallow place at the Lackawanna Crossing below the Chemical Works. My impression is that at normal lake level, about four feet and a half of water over it. I don't think that there is any bar that comes out of the water. If the water was two feet lower it would reduce that two feet and a half in depth. I have seen the water in the harbor six feet below level, that would make the bar dry; and the bottom of the canal, I have seen it, too, under the same circumstances. There is quite a gravel pile just below Seneca Street Bridge; the last time I saw that bar, which was yesterday noon, the water was going up stream. When I was there about 10 days ago the water in the deep place was about 5 or 6 feet. I don't think there was a place there where you couldn't row a yawl boat. I don't think in anything excepting a considerable run of water in the creek and no water in the harbor you would have any trouble going through there. I have been in a boat around there at the Seneca Street bridge every day for ten months. I have taken a level at the City Line of this stream at various times. It is very hard to say what the level is. I should think in normal low water that the water at the City Line is about a foot below harbor level; that would depend very much on the harbor level. If the water were up to mean level in the harbor there would be very little fall; how much, I don't know. I should think it doubtful whether there is a fall in the river. With a southwest wind and the water at normal I should think there would be times when there would be dead water up to the City Line, and at

146 Seneca Street, perhaps a third of the time in the summer season. In the spring time quite a large area of land adjacent to the river is flooded. I have made a good many surveys, and a good many plans at different times for doing away with the flood.

Redirect examination:

I was asked about the use of slag, cinders, and such things for the purpose of filling. It is a fact that all such things for filling of late years have acquired a market value, and they are no longer used to any great extent for filling in vacant and low spots. I have for a part of the year, at least, examined the river with a view to ascertaining the width and depth of the channel between Hamburg Street and the City Line. I made a channel sketch once as far as Seneca Street; I don't remember whether I worked out a channel above that or not. From Hamburg Street to Seneca Street I figured out a channel 40 feet wide and about 4½ feet at mean lake water level. I think that the same channel could be extended at least half way from Seneca Street to the City Line; about half way, I think the only obstruction in that would be the bar below Seneca Street, where there is a row of piles there in the center of the channel at low water; that, I think, is the only bar that would form an obstruc-

tion. That bar, that I speak of, at Seneca Street, is caused by the piles that were put in the river for a temporary bridge. Whatever bars there are there are shifting and changing their location anyway. I think if the piling near this temporary bridge is taken out that the bar will disappear in another year. I think this same channel could be continued up to the W. N. Y. & P. bridge. I haven't examined the matter closely, but that is my impression; that is

147 at mean water level. Of course, with the wind blowing down the lake that depth of water would be increased, and on those occasions I have seen the water fall six feet; when there was a strong wind from the east and northeast, and that would affect not only this portion of the river above Hamburg Street, but the portion below, and stop navigation below. It would affect the Erie Canal; boats on the bottom would tip over in those cases. I have been all over the river in a row boat; I generally go about my business in a row boat. A steam tug has been used up for some little distance above Hamburg Street; I think as far as the Lake Shore bridge. Beginning at Hamburg Street the Union Iron Works have a long dock on the river. The Union Iron Works have altogether three blast furnaces, they bring in by lake all of their ore and limestone, it is a very big institution. They also have a slip running up back of the river east of Hamburg Street, and nearly parallel to it. Below Hamburg Street on the north side is the old D., L. & W. Coal Company's property; was up to within a few years occupied by a large coal trestle that has been removed, and it is at present used for loading and unloading brick and stone, and the lower portion of it is used by the Buffalo Dredging Company; that is docked. The shore across the river is not improved until you get down to the Electric Elevator, that is about 1,500 feet below Hamburg Street. It is a big institution, a large new elevator. Then you come to the Ohio Street bridge, and below that on the north side is, first, the Erie Elevator, Erie Freight Sheds, and Niagara Elevators "A" and "B." Then the New York Central Freight Sheds, then just above Michigan Street, be-

148 low the New York Central Freight Sheds, is the City Elevator, owned by the New York Central Railroad. On the south shore, first there is the Erie Railroad Coal Dock, where they load soft coal for vessels, then there is the Minnesota Ore Dock, where they unload, perhaps, the largest vessels in the port, then another Erie Freight Shed, extending down to the dry docks of the shipyards; they have two or three dry docks. These places all do an extensive lake traffic. Below that are the Mills Dry Docks, and two or three freight sheds; one of them is the New York Central line, used as a storage warehouse, a commissary store for the lake boats; below that more elevators, Chemical Linseed Works, and the Kellogg Elevator, and the Coatsworth Elevator, that brings us down to the Michigan Street Bridge. Below Michigan Street more elevators and freight houses and lumber yards; one large elevator building now, and then we come down to Main Street, where you strike the D., L. & W. Docks and more elevators. On the south side the Blackwell Canal branches off. Large lake vessels go up the Buffalo River as far as the Union Iron Works, shown on this map, and

they also go up the Blackwell Canal, which is an artificial channel, and there make connections with the extensive canals of the Lehigh Valley road. After leaving the waters of the Erie Canal you shortly reach the waters of Lake Erie, and there you have the extensive breakwaters and harbor recently constructed by the United States Government, lighthouse, piers, etc., and the Erie Basin. The Port of Buffalo, I believe, ranks third or fourth in tonnage in the country.

Recross-examination:

149 The river has been dredged the whole length to and above Hamburg Street for the purpose of navigation. The Ohio Basin Slip I think was originally known as Dead Creek, a natural waterway. The other slips, I believe, are artificial, excepting perhaps Commercial Slip, which, I believe, was practically the outlet of Little Buffa'd Creek. I don't know how much they dredged from Hamburg Street to the Union Iron Works, that has been done by private contract; so as to get as good depth as we had below that. They maintained a normal 19-foot channel. This change in the level of the water of the lake doesn't affect the small streams back any distance, but the streams carrying large bodies of water are affected. The ditch running through Tift Farm I think is artificial. I don't know whether that is down to lake level or not; my impression is that it is not. I have seen it back up there in high water. When the level of the water in the river rose the water did not back in or rise in the little creek near Ganson Street turnpike, not in my time, except in very high water. The bottom of the sluice is considerably above normal water level. Quite a number of lumber yards and lumber interests there are on artificial channels or canals; in that section of the city. Those that I have mentioned are the largest commercial interests in the city, almost. I don't know the history of the digging of the canals in the Tift Farm. I have heard it however. I have seen them dredging there; taking the dirt in scows and carrying it way down the river to get rid of it. Every year we dredge in Blackwell Canal, and to get rid of the stuff we go out and dump it up the lake. That material is available for filling, some of it would make very fair filling. Some of the canals of the

150 Tift Farm, I understand, were solid ground, and that material was taken away. I had considered the chance of getting filling of that kind in my estimate for filling, not in the price given, but I have considered that as a source. I mean to tell you that I have taken lowest prices for obtaining filling in that way; to get available filling if it were to be done at the present day. There might be some available filling if the stream were straightened out. I had considered that in my estimate.

Q. In case you straightened the stream there, wouldn't it be cheaper, a saving of money, to take the land and transfer it into the bed of the stream, if they changed the bed of the stream?

A. If a large amount of dirt was to be removed there so they could afford to do it by the expensive plan, it might be cheaper to deposit in an old channel than to take it out but that is problematical.

Witness continues: My estimate is not on doing anything of that kind. It is not necessary to go outside of the City for available filling. If the City made a dump in there it wouldn't cost much to fill. They filled in a great many thousand cubic yards at the Hamburg Turnpike and the river. You can obtain filling in this locality for nothing; various kinds of refuse. There are lots of places in the City where you can get your filling for nothing. Little Buffalo Creek was a public dump, and is all filled in by the sweepings and ashes of the City. I think the Buffalo River is about the same length up to Hamburg Street as the lower slips and the City Ship Canal
151 up as far as the end of the public canal, including all of the artificial slips. The Lehigh may have a mile and a half of canals, but I doubt it. The canal along the Turnpike is about 200 feet wide. It is my impression that it is not a mile long. They have another canal like that further up, a cross canal, and another canal from the cross canal towards Tift Street where they have some warehouses. The last mentioned canal runs almost to Tift Street. All the Lehigh Valley Canals are artificial. In a rough way I should say that it costs from 15 to 20 cents per cubic yard to dig such canals. It costs a little more in hard digging.

Q. To dig a canal 17 feet deep and 200 feet wide and to dock it, it could be done for \$70. a foot, couldn't it, \$35. on each side; isn't that about the running estimate for such things?

A. Depends on the height of the adjoining land. All the land through that territory has a slight fall to the valley. The prevailing land level at the City Line is about 15 feet above lake level. Down on the Tift Farm it is about 5 feet; that is there is a 10 foot fall from the City Line to the Tift Farm. On the lowest part of Tift Farm such a fall as that is not perceptible. \$70.00 would be ample to dig such a canal and construct docks; that is \$35.00 a foot for each half of the canal; \$70.00 for the canal and docks on two sides complete; that would be a fair and liberal estimate for the cheap dock work; some of the Tift Farm work was expensive. I think they have had trouble in various places about the Tift Farm in getting good bottom; they have had that trouble also, in the artificial slips and lower Buffalo River, that was occasioned from dredging out
152 there too much; putting too heavy loads on the docks.

Redirect examination:

I gave you the figures to Seneca Street, and then up—about to the crossing of the W. N. Y. & P. Railroad, for a channel and depth of water. I should think you could get a channel in the upper end of the stream about 2 feet deep and 25 or 30 feet wide, but that would be a fair average channel in the summer season; you couldn't get it all the time. I have sailed up and down this river myself to a considerable extent. I have seen canal boats up as far as the Chemical Works. Our Engineer's office has had steam craft up, I think, as far as the Lake Shore Bridge; that is below the Chemical Works. I don't know what has been the extent of the use by canal boats up in that part of the river. It would take a large number of years to

fill this stream in with refuse and one thing or another from the buildings, excavations for buildings.

Recross-examination:

I don't remember when I saw this canal boat up there that I mentioned; it was a number of years ago. It is my impression that I have seen more than one canal boat. I don't remember any particular thing about it. I don't think it was within three years. I don't think within three years. I have seen canal boats up above the Lake Shore Bridge; above the Chemical Works. I wouldn't swear that I have seen one within 5 years, but I would within 10 years, but couldn't say exactly how long ago. It was before I was interested especially in that portion of the Creek. The refuse of the City
153 is increasing all the time, and that part of the City is building up around there. There are a great many available dumps inside of Seneca and Elk Streets. There is good available ground for dumps near the Hamburg Turnpike, besides the one they have just filled in. I don't know of any available one at the present time, but I think there is plenty of ground within a reasonable distance there that might be used for that purpose. I don't know that all the land along Ganson Street near the Turnpike is filled in by dumping and excavating for the canal. I know where the Sawyer Lumber Yard is. I don't know whether or not that was filled in by the dredging of a private canal there and the dumpings from the City; we dumped a little dirt on the bank, but not much.

FRANK P. BOECHAT, sworn for the City, testifies:

I live at 2369 Seneca Street, South Buffalo. I have been a resident of Buffalo for 9 years last Fall; my business is real estate; I have been in that business about 25 years; I know Buffalo River quite a good deal; I know generally the value of land in that neighborhood, and know of sales.

Q. The land that is proposed to be taken in this proceeding is the bed of Buffalo River, land under the waters of Buffalo River between the easterly City Line and the Indian Reservation Line, near the foot of Hamburg Street, what, in your opinion, is the value of that land?

A. I don't think it has any value.

Q. Do you know whether the Buffalo River is a natural water course?

Objected to as incompetent and improper.

154 Objection overruled. Exception.

A. It is a natural water course.

WITNESS continues: Assuming that it is, as I say, a natural water course, my estimate of the value of the bed of the river is that it has no value; separated in ownership from the adjoining shore it has no value. Assuming it to be a public highway, the value of the land in the bed of the river is the same—it has no value. I have had occasion to observe the use made of Buffalo River during the

period of my residence in South Buffalo, and know previous thereto: back about 35 years ago. I have known *taht* the river was used for navigation purposes by canal boats, yachts and excursion craft of various kinds, and skiffs and scows. I don't know of any rafting on the river. Beginning 35 years ago and coming down to the time of the building of this Seneca Street Bridge I have known of this use being made of the river. That Bridge was started last November, and is just completed. Those boats and crafts came from the lower river. I have seen them go up beyond Seneca Street and Pomona Place. At Pomona Place, an abutment was put there on Sage Avenue. About two years ago piles were driven on the river and a crib built there at the end of the street. They had a scow and pile driver on it. The scow came from the lower harbor. There was one scow at two different times. The work was done by the same parties at different times. The canal boats used to come up to the Schoellkopf Aniline Works; on lot 194 near the Abbott Road. I have been up as

155 far as that point in a tug; that point is at the D., L. & W. crossing, in lot 199. It is used by canal boats; was quite extensive two or three years ago. The last two or three years that hasn't been used. I understand that the water in the river has been somewhat lower during the past few years. In the neighborhood of five or six years ago I saw three boats there at one time unloading oil; they were brought up there by tug. That is the only point on the river where I have seen canal boats. Altogether I have seen a great many canal boats there during the period of 10 or 15 years. Once at Seneca Street and once at Cazenovia Street I saw a scow for a pile driver. I have seen pleasure launches at the Seneca Street Bridge. They were moored there for a number of years; all summer they went up until about two years ago. There were generally about three of them there; some seasons only two. That continued until about two years ago; it was every year, nearly, up to two years ago. The small boats that are in Cazenovia Lake now were brought up from Tonawanda and rowed up Buffalo River to Seneca Street Bridge, and there loaded on a wagon and taken up to the Lake; 13 or 14 of them.

Cross-examination:

There were 12 or 14 row beats and they were taken up to the Seneca Street Bridge, and then taken on wagons to the Park Lake; that is the artificial Lake in Cazenovia Park, a part of Cazenovia Creek. I have not seen these steam launches on Cazenovia Creek, they couldn't go up there. These steam launches were about 30 feet long; I just measured them with my eye. I was on the bridge probably 6 or 8 feet above them, when I measured them with my eye; 156 they were from 8 to 10 feet wide; they drew in the neighborhood of $2\frac{1}{2}$ to 3 feet of water; the largest one did. I saw that one on the bank while they were painting it. I could tell what they drew by seeing them on the bank, and seeing the water line. That was about two years ago, when I saw them. The last I saw of one of them it was upon the bank near Avon Place, just above the Bridge; not being used at all; stored there. I have not

seen it this year. I don't think it is there this year, or I would have seen it if it was there. I didn't look for it. The low water prevented the canal boats from going up to the Chemical Works. I have frequently during the season seen the canal boats. They would make regular trips up there all season long as soon as they could use the river. I call a stream that is provided by nature to carry off the rains, and waters from springs, a natural water course; a two foot creek for some would be a natural water course; anything that carries off water naturally I would call a natural water course. Even a larger stream has no value in my opinion where it is a natural water course. A natural water course has no value; that is the bed of it has not. It made no difference in my opinion whether it was merely a natural water course, or a public highway. If it had no value as a natural water course, it wouldn't detract anything from the value because it was also a public highway. They are both the same; neither a natural water course or a public highway have any value.

Q. So there is no difference in your opinion between a natural water course that is a public highway, and one that is not a public highway?

A. I am always keeping Buffalo Creek in mind when I am talking.

157 WITNESS continues: I take the assumption that Buffalo Creek is a highway, and a natural water course. I am not thinking of any other stream except Buffalo River. I have had some experience with Cazenovia Creek, that is the only other stream. As to Cazenovia Creek I don't think that its bed had no value, it is a private stream, being a private stream I presume it has value. I am just keeping in mind Buffalo Creek; nothing else but Buffalo Creek; that is what I am testifying on. It is a natural water course. I assumed in fixing my opinion of value that it was a natural water course and a public highway, and in my opinion the bed of a creek has no value, but I think Cazenovia Creek is different from Buffalo Creek. It is always considered different. That is all I know, that it is always considered different, and I look at Cazenovia Creek in a different light from what I do Buffalo Creek because of the fact that the titles in Buffalo Creek run to the bank of the creek and the titles in Cazenovia Creek run to the stream. I don't know of any part of Cazenovia Creek that I should want to place any value upon the bed of the stream. I have bought along the bank of Cazenovia Creek and over the creek. I didn't pay for the bed of the stream the same as adjoining land. This was just above Cazenovia Park. I plotted it. There were about 12½ acres in the tract. I paid about \$1,400 or \$1,500 an acre for the upland. I didn't pay anything for the bed of the Creek, and I didn't mention that thing at all. I laid out streets; there were none laid out before. I don't remember how much frontage I had on the acre, probably 300 or 400 feet,

probably more; I can't say positively. I know that the owner in selling didn't consider that he was adding so much to the land on account of the quantity of land I didn't pay for. I know it by the price I paid. I thought I was getting a bar-

gain. I don't know what the seller thought about throwing in the bed of the stream to make it an additional bargain; it was a bargain or I should not have bought it. He didn't tell me that he had not considered the bed of the stream in fixing his price. I don't know whether there was an acre of land in the bed of the stream; I don't know at all in regard to the quantity. The stream was not very wide at that point, probably a little more than 10 feet, probably 15 to 25. The deed didn't run to the center of the 10 or 15 feet, it went away across the stream. I had it surveyed and I left the bed of the river out. I don't know whether it was an acre or a quarter of an acre. The seller didn't have any opinion in the matter, he didn't consider it of any value. I paid \$1,400 or \$1,500 an acre, that made the whole piece in the neighborhood of \$15,000. I didn't take a round sum of \$15,000 and say, "I will give you that for the land." I think there was in the neighborhood of 12½ acres, and I paid \$1,400 or \$1,500 an acre. There was a little matter of a trade also. I don't remember what the trade part was. I give you the amount of cash I paid then I gave something in addition as a trade. When I said that in my opinion the bed of a stream had no value, I meant that it could not be utilized for any purpose. In my opinion it could not be utilized for any purpose that might give it any value. I have not considered the question of exchanging the bed of the stream for other land. I considered the rights existing if the use of the river had been abandoned. I considered it in the question of expense in making it available property and filling it in. Adding the expense of filling it in to nothing might make it so valuable that nobody could touch it. In my opinion the bed of the stream under the present conditions has no future. I know what became of Little Buffalo Creek, that was quite a stream once. That is all filled in now by dumping and refuse from the City. It took a long time to do it, but it is filled in, and it was filled in at a time when the City was a great deal smaller than it is now. That Little Buffalo Creek was a stream as large as Buffalo River is above Seneca Street. I guess it was deeper at some points because it was a mill-race. It ran down into the hydraulics. I crossed it a good many times, but I don't remember how long it was. School No. 5 stands over it now. Under the consideration that the adjoining land is owned by other parties, every loyal citizen of the City of Buffalo has a right to travel Buffalo River. I don't see how anybody can do anything with it. It is not always best to assume that the loyal citizen's rights cease. I don't assume that they can. I don't see how you can stop a natural waterway. In my estimate of value I have considered that right cannot cease. I think that all loyal citizens have an equal right on that stream. I have based my estimate of value on its being a natural waterway and a highway, and it wouldn't make any difference if the water were taken off and the bed of the stream left because it gets into a speculative condition, such a thing is a possibility. The possibility of what you can do with land is what gives it value. Certainly; when I bought that 12 acre tract out there

lated there because I thought there were those possibilities—notwithstanding there is a speculative value, every exchange and trade has. I don't think that this would have value if there was a possibility of trading it. In assuming that there is a chance to trade the bed of the river, and speculate in it, it would have some value, but I have not assumed in giving my estimate of value that there was such a chance to speculate, or exchange or trade. I have considered whether it would be an advantage to the adjoining land to change the course of the stream a little there, which would benefit the public and increase the value of the land, for instance, along the Lackawanna Road here; I have considered that. I have given considerable thought to the matter. I don't see how anybody would dare to fill out from the Standard Oil Company's land into the river. I know of the Lackawanna having dared to put piers in the river. I don't know what is going to prevent somebody else daring to do the same thing, except that the conditions are different from what they were some years ago. Assuming that they dare to fill it from the bank 25 feet, I don't think that the bed of the stream so filled would have value. The adjoining property might be benefited. I have got to consider that part of the way you can go up in boats, and part of the way you can't. At the Standard Oil Works there is quite a narrow strip between the railroad and the river; the river is quite crooked there. Assuming that I filled it out about 25 feet into the river, and it costs me nothing to fill it out because I get the
 161 refuse to fill it, such filled land wouldn't have the same value as adjacent land because the following spring it would be taken away. I base this conclusion on the fact that the water is still there to carry it away. If the stream were diverted at that point and you filled it in the cost of the land might be three times what you can buy the adjoining land for. If it didn't cost you anything to fill it in it might have some value. It would depend entirely on whether the adjoining people would give you access to it. If you had no access to it, what good would it be. Certainly the right of access is valuable. Supposing the Standard Oil Company's land had no access from the south, and you filled it in and gave it access, it would somewhat increase the value of that land. Whether it would increase the value of the whole tract depends upon whether they had use for it. If we don't have too many obstructions out there we hope to build up South Buffalo. I am taking considerable interest in this. I am a member of the South Buffalo Association; the South Park Taxpayers' Association; all citizens, whether of the Association or not, would like to see the bed of the river maintain its normal depth; we don't want to see it straightened; we want to see the bed of the river maintained at its normal height. It would greatly improve all the surrounding property to have this surface water carried off; to the same extent that the grade crossings have improved South Buffalo. It would improve the value of a great many thousand acres of land to have the surplus water taken care of. All that section of the City, including our Association, are very eager to have that done. We are

162 in favor of keeping the Creek as it is, as crooked as it is. We don't want it crooked, but it is crooked and we don't want to be in a position where anybody can stop us from carrying off the water. That being a natural highway they can't stop us. I don't know as anybody has stopped us from carrying off the water. My opinion of value there is based on the assumption that the owner of the fee of the bed of the river has no more rights than any other loyal citizen, as I have expressed it, that is right. I don't grant that the owner of the stream has any rights.

Redirect examination:

My estimate is based upon the assumption that the ownership of the bed of the river is in different persons from that of the ownership the abutting shores. That is my acknowledgment of it from the deeds running down to the bank of the Creek on both sides, and it is upon that that I base my estimate. I have known of cases where farm lands have been cut up into city lots and the owner sold off all lots abutting on the streets and himself retained the bare fee in the streets. I don't see any difference in the character of the value of the a fee in that case, and the value of the fee in the bed of Buffalo River as a natural water course. I think these cases are parallel. The bare fee isn't deeded to anybody. It remains in the owner of the land, but for all time to come parties who abut on that street have the perfect right to enter that street and enter their property, so, for all purposes, except a street, it is eliminated; that is a highway. In that view of the case I say that the bed of Buffalo River has no value. For that same reason Buffalo Creek and Cayuga Creek coming together above the City Line—must find an outlet, water must find a level; it goes
163 down over this piece of land to Niagara River and down Niagara River over the Falls. It can't be put to any other use, and I don't see how in the world anybody would close it up, and it is in that view of the case that I say the ownership of the bare fee is of no value whatever. I cannot conceive of any use to which the owner of Buffalo River could put the bed of the stream.

Recross-examination:

Q. If anybody could use it, then it would have value?

A. Everybody can use it. I have just stated I couldn't think of anything it could be used for to give it value. If somebody else could think up something it could be used for it probably would have some value. I don't know of any possible purpose for which it could be used in its present condition, and that is what my assumption is based on.

Redirect examination:

I think I know as much about it as any one. I think a little practical common sense wants to be used. My estimate was based on the assumption that the ownership of the bed of the river was separate from the adjacent land. That is not what I base my opinion

on entirely. The fact always remains that it is a natural highway. In answer to the question in regard to the adjacent land being separate and owned together, I said it made no difference whether owned by the adjacent owners or not—cut no figure in my estimate of value. You can't alter the conditions of nature and to all intents and purposes streets and this river are exactly similar, and for that reason have the same value—that is nothing.

164 Recross-examination:

I know the Terrace. I know that Mr. Pratt got an award of something like \$10,000 for his fee ownership in that Terrace. It is still a public Street and a highway. I don't know whether that had some value or was the effect of cutting off his business—he had to go around, that might have been one of the reasons. I don't know but probably that was one. I don't know as a fact that they paid him for the fee of the street; I take your word for it. I have heard there was some litigation there. I know that used to be a market place there; the City used it for a market place, now it is a public street and it is paved, and the New York Central is also using it. Assuming that they paid him \$10,000 that wouldn't always change my estimate of the value of the fee in the highway. Some men have more influence than others. I never paid any attention to what they were taking. The pavement on that side of the street is the same as before they took it. His store is not as successful as before they put in that tunnel.

City's Counsel offers in evidence Chapter 179, Laws of 1832, and the Act of 1843, passed April 14; Chapter 230, Laws of 1853; Chapter 519, Laws of 1870; Chapter 105, Laws of 1891.

Objected — by Defendant's Counsel on the ground that the State of New York was not at the time of the passage of those laws the owner of the land in question and could not by a legislative act make it a highway without compensation to the owners. Those laws are irrelevant for that purpose.

COMMISSIONER GREINER: We will admit them for that purpose, but we agree with you that the State of New York could not

165 take anybody's property without due compensation.

Defendant's Counsel offered in evidence Chapter 199 of the Laws of 1901—providing for the exchange of land in the bed of Buffalo River for other lands to be acquired by eminent domain; also the Act of 1895, Chapter 574.

WILLIAM G. DOORTY, sworn for the City, testifies:

I have resided in Buffalo about 33 or 34 years. I am a Tax Title Searcher in the Erie County Clerk's office. I made the search marked "Exhibit I." This search shows, as I understand it, that at one time the Ogden Land Company, or some person as trustee for the Ogden Land Company, owned the property in the neighborhood of the Buffalo River, between the Indian Reservation Line at or near Hamburg Street and the easterly City Line, a large tract of land on both sides of the river. The deeds which are referred to in this

search show that. I have examined the record of title of this property in the Erie County Clerk's office. I examined it about March, 1901—the time that the survey bears date. (Witness shows map Exhibit "2"). The red lines and red figures on the map show the lots as the tract of land was subdivided by the Ogden Land Company about 1840. The Ogden Company, according to our records, made a partition of the Buffalo Indian Creek Reservation lands in 1840, which was ratified and confirmed by a deed executed in 1852 by the parties in interest.

DEFENDANT'S COUNSEL: I want to know right here the object of the proof that is being offered and the nature of it.
166 Whether any part of this proof is being shown for the purpose of showing any adverse claim to the property in question or any claim to an adverse interest or easement in the property in question?

CITY'S COUNSEL: This evidence is being offered for the purpose of showing that the Ogden Land Company after it acquired the title to the property in the Indian Reservation laid the property out in lots, and that they sold the property according to the lots which they laid out abutting on the Buffalo River, sold all the lots, and that the conveyances were to the lot lines which abutted upon the river.

DEFENDANT'S COUNSEL: The competency and relevancy of the evidence is objected to, and the further objection is taken that the Commissioners have no power to determine disputed claims to the property in question. If this evidence is offered with the view of showing any right or interest of any body else in the stream, then it is not proper to be taken into consideration here before these Commissioners. The province of the Commissioners is to determine the value of the property proposed to be taken and not to determine the conflicting interests of claimants to the property; and if this evidence is offered for the purpose of establishing any right or claim of other persons to the property in question, it raises a question that this proceedings is not a proper one to determine.

COMMISSIONER GREINER: I assume this evidence is given for the purpose of proving the fact as to just the conditions that exist in regard to Buffalo River. I suppose the evidence that Mr.
167 Doorty has given here is not the best evidence. If there is any objection made to it upon that ground, the records would be the best evidence.

DEFENDANT'S COUNSEL: Charles E. Appleby, the surviving trustee, etc., takes the following objections:

The proceedings are inappropriate for the purpose of trying the question of title to the property in controversy, or for testing the right of the City to an easement in the land, or the right of its use as a public highway; also, the Commissioners have no power to determine disputed claims to the property in question, and the Commissioners have no power to determine whether the premises in question are a public highway. They have no power to determine conflicting claims to the easement in the premises in question, and

no deduction from the value of the property to be taken should be made on account of any claim made that the river is a highway, nor should any deduction be made on account of any claim or easement in it. And it is with reference to these points that evidence as to titles or claims set up by anybody else in the bed of the river is immaterial, incompetent and irrelevant.

Counsel for the City offered in evidence a subdivision map of the Buffalo Creek Indian Reservation made by the Ogden Land Company, or trustees, of the Ogden Land Company, and also offered in evidence the deeds by which the Ogden Land Company, or the trustees conveyed the lots according to this map abutting on Buffalo River.

DEFENDANT'S COUNSEL:

Q. For what purpose?

CITY'S COUNSEL:

168 A. As evidence in this case to show the condition of the land proposed to be taken.

DEFENDANT'S COUNSEL: I object to it. I object, first, to the map on the ground that its authenticity has not been proved, and that it is irrelevant and immaterial. I object to some of the deeds. I will want a specific deed offered. I object to the deeds being offered in a lump. Some of the deeds differ so that objections I want to take to some of them would not apply to some of the others; but generally, to the deeds and to the proposed evidence:

First, That these proceedings are inappropriate for the purpose of trying the question of title to the property in controversy, or for testing the right of the City to an easement in the land or the right to its use as a public highway.

Second, That the institution of the proceedings is based upon the assumption or fact that the title to the property in controversy is not now in the City.

Third, That the Commissioners have no power to determine disputed claims to the property in question.

Fourth, That the Commissioners have no power to adjudge that the premises in question are a public highway; and I object to evidence given for the purpose of establishing the fact of its being a public highway or of showing any easement in it in the City or any persons other than those to this proceedings.

Fifth, That they have no power to determine conflicting claims to the easement in the premises in question.

169 Sixth, That no deduction from the value of the premises to be taken should be made on account of any claim made that the river is a highway.

Seventh, That no deduction should be made on account of any claim to an easement in the premises adverse to the trustee.

Eighth, That the evidence is inadmissible for the purpose of establishing grounds for an award of less than the value of the premises taken.

Commissioner GREINER: I think the best thing is to go down

stairs and see whether or not the map has been recognized as to be admissible in evidence. As I remember, Mr. Doorty swore that there was some decree of the Court at one time, declaring that it should be admissible as such. Now, we will go down and see about that.

Witness, WILLIAM G. DOORTY, testifies:

This is the map on file in the Erie County Clerk's Office showing a sub-division of the Buffalo Creek Indian Reservation, between the Indian Reservation Line and the easterly line of the City of Buffalo, to which I referred the other day. The certificate attached to this map is the certificate of a Justice of the Supreme Court authorizing the use of the map in evidence in matters affecting titles, as I understand it. The map offered in evidence.

DEFENDANT'S COUNSEL: I want to object to the authenticity of the map, that it does not purport to have been made, nor was it made, nor was it shown to have been made, by authority of any persons who owned any of the land at the time that it was made;

that there have been no conveyances shown to have been
170 made by the trustees of the Ogden Land Company with
reference to that map, and that it is beyond the power of
the Legislature to affect the interests of owners of property by anything that is contained in this map that was made without the authority of the Ogden Land Company or its trustees, and that it is incompetent for the purpose of showing title out of the trustees of the Ogden Land Company. This map does not in fact accurately describe the land embraced in such deeds as were executed by the trustees of the Ogden Land Company.

Objection over-ruled.

Defendant excepts, and map received in evidence and marked "Exhibit No. 3."

The figures on this map on both sides of the Buffalo Creek between the Indian Reservation Line are supposed to indicate the sub-division lot numbers of the Indian land. I have compared these red lines and red figures with Exhibit No. "2." and they practically correspond with the lots as numbered and laid out on Exhibit No. "3." I think the red figures and red lines represent the lots as shown on the original map.

DEFENDANT'S COUNSEL: I object to the copy on the same ground that I objected to the atlas that was made by Tobias Witmer.

CITY'S COUNSEL: The map offered in evidence is marked as a part of the Indian Creek Reservation now included in the City of Buffalo, and it appears on page 1 of Witmer's Atlas of the City of Buffalo.

WITNESS continues: Lot 192, shown on this map, Exhibit No. 3, is recorded in Liber 113.

171 CITY'S COUNSEL: I offer in evidence deed dated April 1, 1850, made by Joseph Fellows, surviving trustee of all the proprietors of certain tracts of land within the State of New York.

called the Seneca Reservation, to Isaac Sherman, recorded in Erie County Clerk's Office in Liber 113, page 468, April 13, 1850. This conveys or purports to convey, lot No. 192 of Lovejoy and Emslie Allotment of said reservation bounded as follows:

Beginning at a post standing on the western boundary of the reservation and the easterly bounds of the City of Buffalo; thence south $43\frac{1}{4}$ degrees east 11 chains and 65 links to a post standing on the northwesterly bank of Buffalo Creek, marked 191 and 192; thence along the bank of said Creek down stream the following courses and distances: south 4 degrees west 10 chains and 13 links; thence south $7\frac{1}{2}$ degrees east 5 chains 75 links; thence south $23\frac{3}{4}$ degrees east 5 chains 11 links; thence south $34\frac{1}{2}$ degrees east 2 chains 89 links; thence south 44 degrees east 3 chains and 26 links; thence south 56 degrees and 45 minutes east 3 chains and 15 links; thence south 70 degrees and 35 minutes east, 11 chains and 40 links; thence south $16\frac{1}{2}$ degrees east 3 chains and 34 links; thence south $68\frac{3}{4}$ degrees west 3 chains and 67 links; thence south 88 degrees west 9 chains 8 links; thence south 70 degrees, west 3 chains and 63 links; thence south 53 degrees and 50 minutes west 11 chains and 53 links; thence south $75\frac{1}{4}$ degrees *degrees* west 2 chains 22 links; thence north $63\frac{3}{4}$ degrees west 2 chains and 23 links; thence north 42 degrees west, 3 chains and 19 links; thence north $33\frac{1}{4}$ degrees west 4 chains and 58 links; thence $25\frac{1}{2}$ degrees west 4 chains and 58 links; thence north $15\frac{1}{4}$ degrees west 2 chains 172 and 93 links; thence north 9 degrees and 20 minutes west 3 chains and 84 links; thence north $\frac{1}{4}$ degree west 2 chains and 62 links; thence north $10\frac{1}{2}$ degrees east 4 chains and 24 links; thence north $25\frac{1}{4}$ degrees east 4 chains and 56 links; thence north 38 degrees east 11 chains and 69 links; thence north $11\frac{1}{2}$ degrees west 4 chains 97 links to the western boundary of the reservation; thence north 46 degrees and 45 minutes east 3 chains 22 links to the place of beginning, containing 81 and 40-100 acres as surveyed by Lovejoy and Emslie, be the same more or less, subject to all taxes and assessments of every description imposed on said land from the 1st day of February, 1847.

DEFENDANT'S COUNSEL: I object to this deed, first, on the ground that it does not cover any of the land in question in this proceedings. Second, upon the grounds heretofore taken to deeds offered in behalf of the petitioner. Third, that the evidence is incomplete without the survey of Lovejoy and Emslie, referred to in the deed. It purports to convey according to a survey of Lovejoy and Emslie, which has not been shown.

Commissioner GREINER: We will receive this for the purpose of placing the Commissioners in a position to know the facts in regard to this land.

Objection over-ruled.

Exception.

Deed admitted and marked "Deed No. 1."

City's counsel then offered in evidence a deed dated July 12, 1845, made by Joseph Fellows, under the same title as before, to Peter Schermierhorn, recorded in Erie County Clerk's Office, in Liber 82

of Deeds at page 323, November 11, 1845, conveying all those
 173 certain lots, pieces or parcels of land situate in the Buffalo
 Creek Reservation in the County of Erie and State of New
 York hereinafter described in the following tables showing the
 townships and ranges in which the several lots lie, the numbers of
 the lots, contents of the same, and the names of the surveyors who
 allotted the same. This is Range 8, Township 10, Lot 61; 63.47
 acres, surveyor James Sperry.

DEFENDANT'S COUNSEL: I make the same objection that I did
 to the previous deed; it does not appear from the deed that it relates
 to or covers any of the premises in question in this proceedings or
 affects the title to any of the premises in question in this proceed-
 ing. The surveys are not in evidence so that the property can be
 identified upon this map.

Commissioner GREINER: I will admit the deed, and I assume that
 the Corporation Counsel will prove that the Lovejoy-Emslie surveys
 are either the same surveys, or in substance the same surveys, as the
 map in evidence made by Mr. Witmer, and he is bound to prove that.

Objection over-ruled.

Defendant excepts.

Deed admitted and marked "Deed No. 2."

City's Counsel offered in evidence deed dated June 26, 1845, by
 Joseph Fellows, under same title as above, to Benjamin W. Rogers
 and Richard H. Ogden, sole acting executors, etc., of Thomas L.
 Ogden. This conveys two lots or pieces or parcels of land, being
 part of the tract of land called the Buffalo Creek Reservation here-
 tofore occupied by the Seneca tribe or nation of Indians, the said

lots hereby intended to be described being situate in the
 174 town of Black Rock in the County of Erie and Township
 No. 10 of the 8th Range and distinguished on the survey
 map made by Lovejoy and Emslie of that part of the reservation tract
 and situate in the City of Buffalo, No. 178, containing 37.89 acres.

DEFENDANT'S COUNSEL: I object to that on the same grounds as
 the other previous deeds, and also without the survey referred to
 in it is impossible to identify the land in question.

Commissioner GREINER: It is admitted upon the assumption that
 the Corporation Counsel will produce the evidence. If he does not
 we will strike it out.

Objection over-ruled.

Defendant excepts.

Deed admitted and marked "Deed No. 3."

City's Counsel offers in evidence a deed dated July 2, 1855, made
 by Joseph Fellows, under the same title as above, to Duncan P.
 Campbell and Jesse Ketchum, recorded in Erie County Clerk's
 Office in Liber 145 of Deeds at page 47, September 27, 1855, con-
 veying all that certain piece or parcel of land situate in the City of
 Buffalo in the County of Erie and State aforesaid, being part of the
 Buffalo Creek Reservation heretofore occupied by the Seneca tribe
 or nation of Indians, known and distinguished as lot No. 164 of the

Lovejoy and Emslie tract adjoining the City of Buffalo, in Township 10, Range 8, containing 5.36 acres, be the same more or less, as surveyed by said Lovejoy and Emslie.

175 DEFENDANT'S COUNSEL: I make the same objection as to the last deed, and also without the evidence of survey of Lot 194 by Lovejoy and Emslie the property cannot be identified.

Objection over-ruled.

Defendant excepts.

Deed admitted and marked "Deed No. 4."

City's Counsel offers in evidence a deed dated January 1, 1845, made by Joseph Fellows and others, the same title as above, to Henry Lamb, recorded in Erie County Clerk's Office in Liber 81 of Deeds at page 6, July 11, 1845, which conveys land situate in the Town of Black Rock in the County of Erie and State aforesaid, being part of a tract of land called the Buffalo Creek Indian Reservation heretofore occupied by the Seneca tribe or nation of Indians, known and distinguished at Lot No. 196 of Lovejoy and Emslie's survey adjoining the City of Buffalo, in Township 10 and 8th Range of townships, containing 18 and 92 100 acres, as surveyed by Lovejoy and Emslie

DEFENDANT'S COUNSEL: Same objection as to the last deed.

Objection over-ruled.

Defendant excepts.

Deed admitted and marked "Deed No. 5."

Counsel for City offers in evidence a deed dated January 1, 1845, between Joseph Fellows, under the same title as before, and another, to Helen Stone; conveys land in the Town of Black Rock, County of Erie, etc., being part of the tract of land called the Buffalo Creek Reservation heretofore occupied by the Seneca tribe or nation of Indians, and known and distinguished as Lot No. 59 in Township 10, Range 8 of townships, containing 14 acres and 40/100 of an acre, as surveyed by James Sperry, be the same more or less.

176 DEFENDANT'S COUNSEL: Same objection to that as to the previous deed, except that this refers to a survey by James Sperry, and that survey is necessary to identify the land.

Objection over-ruled.

Defendant excepts.

Deed admitted and marked "Deed No. 6."

Counsel for the City offers in evidence deed dated January 1, 1845, made by Joseph Fellows, under the same title as before, and another, to Richard Evans. This conveys Lot No. 60. This is recorded in Erie County Clerk's Office in Liber 81, page 119, August 3, 1847.

DEFENDANT'S COUNSEL: same objection as to preceding deed.

Objection over-ruled.

Defendant excepts.

Deed admitted and marked "Deed No. 7."

Counsel for City offers in evidence deeds that are mentioned in a list which he produces, which shows the Liber and page of the conveyance, and the lot number, and the number of acres contained in the lot, and the name of the surveyor referred to in the deed, and the Liber and page of the field notes of the surveyor.

DEFENDANT'S COUNSEL: To each of these deeds I object separately on the same grounds that I objected to the last preceding deed.

Objections over-ruled.

177 Defendant separately excepts as to the ruling as to each deed received.

List of deeds admitted and marked "Exhibit No. 8."

(This list is printed before in roll.)

Samples of description contained in said deeds is annexed to case. Copies of any of the foregoing deeds may be read on the argument, although not printed.

MR. WILLIAM G. DOORTY, recalled by the City, testifies:

I have been engaged in the business of searching in the Erie County Clerk's Office for about 25 years. I have had occasion to examine the deeds and make searches of titles of land in the Buffalo Creek Reservation, so-called. Adjoining the Buffalo River and elsewhere.

Q. On the map that was introduced here, a record from the Erie County Clerk's Office, certain sub-divisions were shown on the Buffalo Creek Indian Reservation. Do you know of any other original sub-division of that territory?

DEFENDANT'S COUNSEL: I object to that as incompetent, irrelevant and immaterial.

Objection over-ruled.

Defendant excepts.

A. I have no other maps except the ones offered in evidence, I mean original sub-divisions; of course, I don't mean the subsequent sub-divisions into city lots.

DEFENDANT'S COUNSEL: Those don't purport to be originals and are not originals. It is immaterial whether Mr. Doorty knows of them or not.

178 Q. Do you know, or are you able to to say, Mr. Doorty, whether the land in the Buffalo Creek Indian Reservation has been sold and conveyed generally with reference to this sub-division shown by the map that was introduced in evidence.

DEFENDANT'S COUNSEL: I object to that as the deeds from the trustees of the Ogden Land Company are the best evidence as to what they sold by, and sales by other people are immaterial and are incompetent as against the trustees of the Ogden Land Company. They cannot be bound by sales made by other parties, unless they confine their testimony to sales made by the Ogden Land Company or its

trustees, the testimony is inadmissible, the sales of other parties are inadmissible.

Objection over-ruled.

Defendant excepts.

A. From the records in this office I believe that the land lying along the north side of Buffalo Creek from the Reservation Line to the east line of the City was surveyed by Lovejoy and Emslie, and the land lying along the south side of the Creek, between the same points *were* surveyed by James Sperry. I base that belief on the evidence I have in this office, consisting of these maps and field notes. (Witness shown book marked "Index to Holland Land Company notes"). Part of that has reference to the Indian Reservation within the City. I cannot tell you how long this book has been in the office. It was here when I came here 25 years ago. It is one of the public records of the office. The map to which I have referred relates to all the Buffalo Creek Indian Reservation land lying within
179 Township 10, Range 7. There is also Township 10, Range 8, that is a part of this same book. I spoke just now of the field notes; I have two volumes of field notes here, which I have been using for the purpose of finding the field notes as to the lots abutting on Buffalo Creek. I have Volume 2 and Volume 6. One is marked "Volume 2, James Sperry survey B. C., Reservation, 1843," and the other is "Volume 6, P. Emslie and Lovejoy survey, Volume 4, B. C., Reservation lots 1-201, 1844." Those records were also here in the office when I came here.

City's Counsel offers in evidence the maps and the two volumes of field notes.

DEFENDANT'S COUNSEL: I object to the map on the ground that there is nothing to show that it was ever filed and it is not authenticated in any way; there is no mark showing when it was filed, by whom or by whose authority; nothing showing that the trustee of the Ogden Land Company ever authorized the map or the filing of it. This is not an original map made by Lovejoy and Emslie, and not the one referred to in the evidence, and there is no evidence that it is a correct copy of the Lovejoy and Emslie map. It is not the best evidence in regard to their map; the original itself is the best evidence and should be produced.

Objection over-ruled.

Defendant excepts.

Map received in evidence and marked "Exhibit No. 4."

(A copy of said map may be used by either party on the argument, but the same need not be printed.)

I want further to object that the field notes show that the
180 deeds read in evidence don't cover the property in question in this proceeding, that is the bed of the Buffalo Creek.

Objection over-ruled.

Exception.

Filed notes received marked "Deed Exhibits 9 and 10."

(Extracts from field notes sufficient to show their character may

be printed, following the case, and either party may refer on the argument to any other.)

WITNESS CONTINUES: On that map the east line is marked "Town Line," it was the east line of the Town of Black Rock originally—Township 10, Range 7. The easterly line of the Town of Black Rock and the present easterly line of the City of Buffalo is the line of Township 10, Range 7 at this point.

Cross-examination.

The lot and the post mentioned at the beginning stand on the bank 48 links south $42\frac{3}{4}$ west, from the place of beginning, and the courses and distances are laid down from that post standing on the bank of the stream, I believe.

WILLIAM H. SLADE, recalled and sworn in behalf of the City testifies:

I was sworn in this proceedings the other day. I was subpoenaed to produce here a certain map of the Buffalo Creek Reservation (Witness produces map). I have had this map for over 20 years. I think I got it from Peter Emslie of the firm of Lovejoy and Emslie. He made the surveys that I have been talking about here about the time

I was born.

181 Q. Do you know from your knowledge, or from your experience, whether this sub-division map, or one exactly like it, is accepted and regarded as the sub-division by Emslie and Lovejoy and by Sperry of the land adjoining the Buffalo Creek Indian Reservation?

DEFENDANT'S COUNSEL: I object to that as incompetent, and this is not the map referred to in the deeds. There is no evidence that any conveyance by any trustee of the Ogden Land Company was ever made with reference to this map, and the same is not the best evidence. It is not an original map, it is not signed or authenticated by anybody and is not shown to have been used by anybody.

Objection over-ruled.

Defendant excepts.

A. I have referred to this from time to time in the prosecution of my business, but whether it is correct, I have no means of ascertaining, but it answered my purpose in transacting my business.

WITNESS CONTINUES: I don't think the question was ever up as to whether it was correct or not. It has never been accepted as proof of the original sub-division of that territory. It has never been in evidence before. I don't know whether the sub-division shown is that which has been accepted in that part of the City for a number of years by the public and the land owners generally. I only know by these marks as set out here as to what part of the Buffalo Creek Reservation was surveyed by the Lovejoy and Emslie, and what part was surveyed by James Sperry. Of its correctness I don't know anything.

182 Q. What does it show in regard to what part James Sperry surveyed, and what part Lovejoy and Emslie surveyed?

DEFENDANT'S COUNSEL: I object to that as incompetent. We have the original field notes that show.

Objection over-ruled.

Defendant excepts.

This map shows that inside of the City the lots north of the Buffalo Creek were surveyed by Lovejoy and Emslie and those on the south by James Sperry.

Cross-examination:

There is nothing shown on this map except that somebody has stamped on it the words "Surveyed by Peter Emslie" and somebody has stamped on it "James Sperry" in one place, and in another place "Lovejoy & Emslie," and in another place "Cook & Jones." That is just as I received it from Peter Emslie. I made no alteration in it; I couldn't, having no knowledge of the subject. It is just as I received it.

DEFENDANT'S COUNSEL: I object to this map even if it were something made by Peter Emslie, as a declaration, because at most it would be a declaration made after his employment as surveyor had ceased.

Objection over-ruled.

Defendant excepts

Map admitted and marked "Map Exhibit No. 5."

(Said map need not be printed but a copy of the same may be referred to by either party on the argument.)

183 Counsel for the City offers in evidence from the City's Assessor's maps and surveys a map of the 5th Ward, Part 2, pages 27, 28, 29, 30, 34, 35, 40, 41, 42, 44, 45, 48; and from No. 3, pages 63, 64, 65, 66, 67, and 68; and from No. 4, pages 103, 104, 105, 106 and 114.

CITY COUNSEL also states: I have offered in evidence these Assessors' maps which show Buffalo River from the Indian Creek Reservation to the easterly City Line.

DEFENDANT'S COUNSEL: I object to them as incompetent and irrelevant; that the maps were not made by the trustees or any representative of the Ogden Land Company, or persons interested, and that no conveyance from Charles E. Appleby, trustee, or any of his predecessors was ever made by these maps; they have never been recognized by him or any of his predecessors, and are incompetent as evidence to affect any right or interest of Mr. Appleby as trustee.

Objection over-ruled.

Defendant excepts.

Map received in evidence and marked "Exhibit No. 6."

(These maps need not be printed but either party on the argument may use such copies as he wishes.)

ERNEST SIEGSMUND, recalled for Defendant, testifies:

I have made some computations as to how much the area of some of the lots would be increased if they were extended to the center of

the river from where the surveys located the stakes on the bank of the river. Lot 192 is put down in the survey as containing 81.41 acres, if the line were extended so as to include the water to the middle of the stream it would increase the area of that lot 20.70 acres. — lot 178 were extended, its area would be increased 8.88 acres, it is put down on the map as containing 37.90 acres. If Lot 196 is put down as containing 18.92 acres, to so extend the line to the center of the stream would increase the area 1.46 acres. Lot 187 is put down as 4.80 acres, to extend the line to the center of the stream would increase it 78-100 of an acre. All of the lots where the survey indicates or states that the side lines terminate at stakes standing on the bank of the river would be increased materially in area if their lines were extended to the center of the river to the amount I have mentioned before. Those I have given specifically, and all of the other lots would be materially increased in area, and the length of the side lines would be materially increased. In Lot 192, to extend the side lines to the center of the stream would increase them about 116 feet; the side lines of Lot 178 would be increased about 90 feet; and those of Lot 196 would be increased about 80 feet.

Cross-examination:

I got my information as to the lots from the field notes of Peter Emslie and Lovejoy; that is to say, I examined the field notes, and as a result of my examination I found that Lot 192 near Hamburg Street to the Union Iron Works, and Lot 178; and so with all the other lots mentioned; the information I give I got from the field notes. I had no difficulty in locating them on the stream. Those are the field notes that were in evidence down in the County Clerk's Office. I didn't go down to the river and survey it.

I took the field notes and plotted according to the field notes, and then I computed the area; that is, I took the shore on the field notes and allowing a certain width for the stream, I took $\frac{1}{2}$ of the width of the stream and added that to the area of the lot.

MARSDEN DAVEY, sworn on behalf of C. E. Appleby, testifies:

I reside in Buffalo and am a surveyor and civil engineer. I have been engaged in that business between 35 and 40 years. I knew Peter Emslie very well. During the war of the Rebellion I was his assistant. I was with him 4 or 5 years as assistant before I started in business for myself as a civil engineer and surveyor. Peter Emslie was one of those who surveyed a portion of the Buffalo Creek Reservation, and assisted in making the Lovejoy and Emslie survey. After Peter Emslie's death the original field notes and map made from that survey came into my possession, and I have the original map here. I have the original office map, and I have also the original field notes covering that survey. I have his original field notes in his own handwriting. This is a map of that survey made by Peter Emslie. In the field notes the lots nearest to the river terminate at stakes standing on the bank of the river. The lots nearest the stream terminate at stakes laid down in the field notes. On this

map there are lines laid down apparently as the margin of the bank of the stream, and also red lines. That is along the bank of the stream. Near the bank of the creek of the lots surveyed by Lovejoy and Emslie there are two lines, one is black and the other is red. I have compared the red line with some of the field notes of survey. The black lines on this map indicate the top of the bank.

Commissioner GREINER: Let the witness answer the question, the map is a little blurred.

WITNESS continues: The red lines indicate the courses and distances of Lovejoy and Emslie's survey and are, according to their field notes, and are drawn on this map straight from one post to another, apparently the distance put down in the field notes. If you will excuse me, this line doesn't indicate the margin of the stream, the top of the bank, in some places the stream is further away from that line than others. The bank of the stream in some places curves where the course laid down in the survey was straight. I have surveyed lots according to Lovejoy and Emslie's survey, following their field notes. The stakes were placed with reference to the stream on the top of the bank. The bank of the stream varies in height from a foot or 18 inches to probably 20 feet in places. Taking the majority of the bank, as near as I could judge, I should think 10 feet for an average would be about the right height. It would not be far from that either way, taking the average all through. These banks do not slope regularly from the top, where the stakes were located, to the margin of the water. The average slope of this kind of earth would be what is commonly known as one-half to one, one-half horizontal to one foot perpendicular; about 50 per cent, more horizontal than perpendicular. In a bank 10 feet high the natural slope would average 15 feet; these banks are very irregular, different kinds of soil work in different ways, so that from the places where the stakes were stuck on the bank to the margin of the water there would be an average, a distance of 12 to 15 feet horizontal, so that there would be about 12 to 15 feet of land between the margin of the stream and where the stake was stuck if you went down perpendicularly from where the stake is. In places the stream has changed its course and bed. I know the banks have changed since that survey materially. In some places some of the bends are cut off; other places gradually washed from one side and added to the other. Today there isn't one of these original stakes left in the bank, so that on some of the lots that are laid down there has been a considerable addition of land above water. I know of one particular case in Lot 14. I remember when the creek ran around in that direction, it now runs like that (indicating); here is the street railroad barns. It has been cut through in that shape since my time; cut off $2\frac{3}{4}$ acres of this lot and added it to that side, besides the bed of the stream. I think there are many places where land has been added to the north bank of the stream by gradual accretion, but I can't call to mind any particular point just at the present moment. There have been additions on the Lovejoy

and Emslie survey to the land by gradual accretion; I know there have been, but I can't call them to mind now. I presume there is land above water now in the Lovejoy and Emslie survey that was under water at the time of the survey. I *can't* tell without calculating it about how much longer the side lines of the slopes terminating at the stakes would be than they are given in the survey, if they extended to the center of the stream. There is such a variation.

I couldn't give you an average; some of them would extend
 188 several chains longer, and most of them would be pretty nearly a chain longer; so that the side lines would be half the width of the river longer, and it would run very nearly a chain longer; longer than what is laid down in the field notes and maps of the survey.

Cross-examination:

The black lines here, or rather the wavy black lines, indicate the top of the bank, and those lines that run at angles indicate courses and distances according to the survey. From one stake to another, and those stakes were driven sufficiently back from the margin itself so they wouldn't fall down. That is the usual course of surveying the line along river banks. It is customary to put the stakes as close to the top of the bank as you think it will be safe, at least for some years, and room to stand your instruments. We have got to have that in order to make our survey, and that is what this map indicates was done in that survey that Lovejoy and Emslie made of the north bank of the stream. Every stake was numbered as shown on the map. The quantity was computed to the stakes, not including the river. A portion of the river is navigable all the time and the rest of it is not navigable all the time. The course of the river has changed considerably. That is true from the City Line way down to the Indian Reservation. This cut which I spoke of at the Seneca Street Bridge, cut off from the north bank of the river quite a considerable tract of land; about two acres and three-quarters of land, besides the bed of the stream. The height of the

water, of course, in the Buffalo River, varies at different seasons of the year, and it varies over different periods of years;
 189 rises and falls over different terms of years in something like a tide. I know there is a variation in the height of the water in the lake, but whether it affects the Creek very far up, I don't know. Emslie's survey extended along the north bank of the river from the Indian Reservation Line past the present City Line; it extended beyond the City Line. Here on this map the line is the east line of the City indicated on there; it is marked "City Line," and this is all surveyed beyond there (indicates). I think it was James Sperry who surveyed to the south of the river. James Sperry and Cook & Jones surveyed the others. They were outside of the City Line mostly. Jones and Sperry, it seems to me, worked together.

Q. I understood you to say, Mr. Davey, that the manner of surveying here which you have described as made by Peter Emslie, is

the usual and customary way of surveying along the banks of streams?

DEFENDANT'S COUNSEL: I object to that.

Q. As indicating the shore line?

Commissioner GREINER: He may answer that.

A. Yes, sir.

DEFENDANT'S COUNSEL:

Q. Now, when they surveyed as they have in this case, they have placed their stakes on the bank of the stream and have got the distance to that stake?

A. Yes, sir.

Q. And stop at the stake?

A. Yes, sir.

Q. So that their measurements as given and laid down
190 on the map and field notes do not include anything except to the stake?

A. Yes, sir.

WITNESS continues: If it is desired to convey or survey to the center of the stream they give those additional distances. But when they desire to stop at the bank of a stream, they say the bank of the stream, to the place where the stake is stuck, and then they compute their area to the place where the stake is stuck and nothing besides that. These areas that are put down on this map include the blocks to the stakes and nothing outside of them.

CITY'S COUNSEL:

Q. Now, Mr. Davey, isn't it a fact that the only reason they make these lines on the margin of the stream there is in order to calculate the areas?

A. Yes, sir.

Q. That is the reason for it, the area of the lot itself?

A. Yes, sir.

DEFENDANT'S COUNSEL:

Q. Can't you calculate the additional area to the center of the stream as a surveyor?

A. I believe I could, yes, sir. I guess it wouldn't trouble me or any other surveyor much, either. When I want to survey to the center of a stream and give the length of the lines to the center of the stream it is quite possible for me to do it. When I want to stop on the bank of the stream and put a stake there, I put it there as being the terminus of my line, usually, and when I say that it is such a distance to such a stake that is what it means, that it is to that stake and no further. I said the freshets caused a difference in the level of the water, spring and fall freshets.
191 The tide would come in from the lake and the freshets would come down; that caused that change, that is what I mean by that.

CITY'S COUNSEL: I notice in some of these cases these angular

lines which are supposed to indicate the survey line outside of the bank? Now near the bank of the stream in that way it is customary to take the average of the depth of it; sometimes the line will be inside the bank line, and sometimes out of it. There are occasions of that kind and that may be without going to the margin of the water. It may go to the water. Sometimes it is possible in running the line the way I have spoken of here, averaging it up, that they may sometimes go as far as the water. It is possible to do so, but I don't think they do.

Q. I mean generally in making surveys of that character it would very often happen that the survey line would go almost, if not quite to the water's bed?

A. I have known of cases like that.

DEFENDANT'S COUNSEL:

Q. In this survey where it went beyond the margin of the bank, did it go to the margin of the water in any case that you know of?

CITY'S COUNSEL: The object of that is to average up on the area and get the lot fronting on the river according to its area?

A. Average it up for that course.

Q. But it might average up for the one lot, though, mightn't it?

A. No, if there was only one course it would.

Q. That is the object of it isn't it, to average it up?

192 A. Yes, sir.

DEFENDANT'S COUNSEL: It is conceded that the original field notes in the hands of Mr. Doorty are correct copies, those field notes that are produced are correct copies.

Map produced by Mr. Davey was here admitted in evidence and marked "Map Exhibit No. 7." (Annex copy of so much of the map as shows the lots nearest to the river to end of case.)

DEFENDANT'S COUNSEL: I offer in evidence Chapter 199, Laws of 1901, authorizing the City to exchange lands; and I offer in evidence from the proceedings of the Common Council of the City of Buffalo, at pages 251, 392 and 409, resolution of intention and resolution of determination to take the bed of Buffalo River in fee simple so that the determination under which these proceedings are taken is to take the absolute fee of the land.

Received in evidence. Such resolutions are set forth in the order appealed from, and are made a part of this case.

DEFENDANT'S COUNSEL: Then in the proceedings of 1900, on page 1164, the Board of Public Works and Engineer are requested to prepare plans for the abatement of floods in the Buffalo River and Cazenovia Creek, such plans to include a drainage channel from Buffalo River at or near Farmers' Point to Lake Erie and report. Resolutions ordering plans for widening and straightening Buffalo River; minutes of 1898, page 1,233, a resolution of intention to order same according to Plan "A" on file in the office of the Board of Engineers and Board of Public Works.

They were received in evidence.

193 CITY'S COUNSEL: The only person or corporation whose rights are sought to be taken in this proceeding are the rights of the trustees of the Ogden Land Company.

The foregoing is all the evidence and proceedings before said Commissioners.

Afterwards and on the 30th day of August, 1901, the said Commissioners filed in the Erie County Clerk's office their report, dated that day, of which a copy is hereto annexed, and exceptions thereto were duly filed and served, of which a copy is hereto annexed.

Afterwards the said petitioner applied to the Supreme Court at a Special Term thereof, held at the Court House in the County of Erie, on the 24th day of October, 1901, for an order confirming the said report of said Commissioners, and the Attorney for the said Charles E. Appleby, trustee, etc., preliminarily objected to the hearing of said application, on the ground that the evidence taken by the Commissioners had not all been filed and that material exhibits and documents had been omitted, and had not been filed with the evidence, and in support of such objections read and filed his affidavit, verified October 15th, 1901. (A copy appears before.)

The Court over-ruled the objections, and subject to the said objections proceeded to hear the application and afterwards made the order dated December 31st, 1901, entered in the office of the Clerk of Erie County on the 8th day of January, 1902, of which a copy is hereto annexed.

Afterwards and on the 4th day of February, 1902, the said Charles E. Appleby, trustee, etc., made a motion at the Special Term of the Supreme Court held in Erie County to set aside said report
194 and order for other relief, and a copy of the affidavit and notice of such motion is hereto annexed. On such motion the Court made the order dated February 10th, 1902, hereto annexed.

In due time the said Charles E. Appleby served on the plaintiff's Attorney, and the Clerk of the County of Erie, the notice of appeal from the order dated December 31st, 1901, of which a copy is hereto annexed, and after the making of said order of February 10th, 1902, the said Charles E. Appleby, as trustee, etc., in due time served the notice of appeal therefrom hereto annexed.

The foregoing is all the evidence taken and the proceedings before said Commissioners, and all the proceedings in the above entitled proceeding.

PLAINTIFF'S DEED EXHIBIT No. 1, Lot 192.

A warranty deed dated April 1, 1850, made by Joseph Fellows, as surviving trustee of all the proprietors of certain tracts of land within the State of New York, called the Seneca Reservation, to Isaac Sherman, recorded in Erie County Clerk's Office in Liber 113 of Deeds at page 468, April 13, 1850.

The description in the deed is as follows:

All that certain lot, piece or parcel of land, situate in the Town of Black Rock, in the County of Erie and State aforesaid, being part of the tract of land called the Buffalo Creek Reservation heretofore occupied by the Seneca Tribe or Nation of Indians, known and distinguished as Lot No. 192 of Lovejoy & Emslie's allotment of said reservation and bounded as follows: Beginning at a post standing in the west boundary of the reservation and easterly bounds of 195 the City of Buffalo, then south $43\frac{1}{4}$ degrees east 11 chains, 65 links to a post standing on the north-westerly bank of Buffalo Creek, marked 191 and 192, then along the bank of said Creek down stream, the following courses and distances, south 4 degrees, west 2 chains 13 links; thence south $71\frac{1}{2}$ degrees, east 5 chains 75 links; thence south $23\frac{3}{4}$ degrees, east 5 chains 11 links; thence south $34\frac{1}{2}$ degrees, east 2 chains 89 links; thence south 44 degrees, east 3 chains 26 links; thence south 56 degrees, 45 minutes, east 3 chains 15 links; thence south 70 degrees, 35 minutes, east 11 chains 40 links; thence south $16\frac{1}{4}$ degrees, east 3 chains 34 links; thence south $68\frac{3}{4}$ degrees, west 3 chains 67 links; thence south 88 degrees, west 9 chains 8 links; thence south 70 degrees, west 3 chains 63 links; thence south 53 degrees, 50 minutes, west 11 chains 53 links; thence south $75\frac{1}{4}$ degrees, west 2 chains 13 links; thence north $84\frac{1}{4}$ degrees, west 2 chains 22 links; thence north $63\frac{3}{4}$ degrees, west 2 chains 23 links; thence north 42 degrees, west 3 chains 19 links; thence north $33\frac{1}{4}$ degrees, west 4 chains 58 links; thence north $25\frac{1}{2}$ degrees, west 4 chains 58 links; thence north $15\frac{1}{4}$ degrees, west 2 chains 93 links; thence north 9 degrees, 20 minutes, west 3 chains 84 links; thence north $\frac{1}{4}$ degrees, west 2 chains 62 links; thence north $10\frac{1}{2}$ degrees, east 4 chains 24 links; thence north $25\frac{1}{4}$ degrees, east 4 chains 56 links; thence north 38 degrees, east 11 chains 69 links; thence north $11\frac{1}{2}$ degrees, west 4 chains 97 links to the western boundary of the reservation; thence north 46 degrees, 45 minutes, east 3 chains 22 links to the place of beginning containing 81 acres and forty hundreds of an acre, as surveyed by Lovejoy & Emslie, be the same more or less, subject to all taxes and assessments of every description imposed 196 on said land from the 1st day of February, 1847.

Field Notes—Lovejoy & Emslie, Lot 192.

The description of Lot 192 as it appears in the field notes of Lovejoy & Emslie is as follows:

"Beginning at a post standing on western boundary of reservation and easterly bounds of the City of Buffalo and northwesterly corner of this lot, marked 191, 192, running from thence S. $43\frac{1}{4}$, E. 11.65 to a post standing on the westerly bank of Buffalo Creek, marked 191, 192; thence along the bank of said Creek (down stream), the following courses and distances: S. 4, W. 213, S. $7\frac{1}{2}$, E. 5.75, S. $23\frac{3}{4}$, E. 5.11, S. $34\frac{1}{2}$, E. 2.09, S. 44, E. 3.26, S. $56\frac{3}{4}$, E. 3.15, S. 70.35, E. 11.40, S. $16\frac{1}{4}$, E. 3.34, S. $68\frac{3}{4}$, W. 3.67, S. 88, W. 9.08, S. 70, W. 3.63, S. 53.50, W. 11.53, S. $75\frac{1}{4}$, W. 2.13, N. $84\frac{1}{4}$, W. 2.22,

N. $63\frac{3}{4}$, W. 2.23, N. 42, W. 3.19, N. $33\frac{1}{4}$, W. 4.58, N. $25\frac{1}{2}$, W. 4.58, N. $15\frac{1}{4}$, W. 2.93, N. 9.20, W. 3.84, N. 0 degrees, 15 minutes, E. 2.62, N. 10.30, E. 4.24, N. $25\frac{1}{4}$, E. 4.56, N. 38, E. 11.69, N. $11\frac{1}{2}$, W. 4. 97 to the western boundary line; of the reservation thence N. 46.45, E. 3.22, to the place of beginning, containing 81 40-100 acres.

Description, etc.: The greater part of this lot is good dry flat bottom land and mostly under first rate improvement some eight or ten acres on west side is rather low and at stages of very high water is overflowed. Value per acre \$60.00."

PLAINTIFF'S DEED EXHIBIT No. 2.

Partition Deed Joseph Fellows to Peter Schermerhorn, Recorded in Liber 82 of Deeds, page 323, November 11, 1845.

197 This indenture made the 12th day of July, 1845, between Joseph Fellows of Geneva, County of Ontario and State of New York, surviving trustee for all the properties of certain tracts of land in the State of New York called the Seneca Reservation, of the first part, and Peter Schermerhorn, of the City, County and State of New York, of the second part, whereas, by a certain deed bearing date the 8th day of February, 1821, between the late David A. Ogden and wife, of the first part, the late Paul Bustifi of the second part, the late Joshua Waddington and others, of the third part, the late Thomas L. Ogden and others, of the fourth part, certain lands in the Western part of the State of New York called the Seneca Reservations, were conveyed to the party in the said deed of the fourth part, reference to said deed or the record thereof in Liber 1 of Deeds for Erie County, at page 10, etc., will more fully appear; and whereas by certain other deed between the said Robert Troup, Thomas L. Ogden and Benjamin W. Rogers, of the first part, the late Charles G. Troup and the said Joseph Fellows, of the second part, and the said Thomas L. Ogden, Charles G. Troup and Joseph Fellows, of the third part, bearing date the 19th day of December, 1829, the said tracts of land were conveyed to the said parties of the third part as joint tenants, reference to the said deed or the record thereof in the Clerk's Office of Erie County, in Liber 27 (16) of Deeds, page 72 (382) will more fully appear, and whereas the said Thomas L. Ogden and Charles G. Troup have departed this life and the said Joseph Fellows as survivor holds the legal title to the said tracts of land and the Indian title to two

198 of the said tracts known as the Buffalo Creek Reservation, has been extinguished by treaty bearing date the 20th day of May, 1842, and whereas upon a partition of certain parts of the said last mentioned tracts made between the proprietors interested therein, the lots of land herein released and conveyed were allotted and set off to the share of the said Peter Schermerhorn.

Now therefore this indenture witnesseth that the said Joseph Fellows, as survivor aforesaid, in execution of the trust conveyed in said several deeds and in pursuance of said partition and for and

in consideration of One Dollar to the said Joseph Fellows paid by the said Peter Schermerhorn, the receipt whereof is hereby acknowledged, hath sold and by these presents doth sell, grant, release and convey unto the said Peter Schermerhorn and to his heirs and assigns forever all the estate, right, title and interest both at law and in equity of the said Joseph Fellows in and to all those certain lots, pieces or parcels of land situate in the Buffalo Creek Reservation, in the Town, County of Erie and State of New York, described in the following tables showing the townships and ranges in which the several lots lie, the numbers of the lots, contents of the same and the names of the surveyor who allotted them.

The deed then goes on and mentions 43 lots containing 2124.87 acres, giving only the numbers of the towns, ranges, townships, number of lots, part of lots, quantity in lots and by whom surveyed. It does not give any of the metes and bounds. The only lot adjacent to Buffalo Creek is Lot No. 61, which is described as Range 8, Township 10, Lot 61, whole of lot, quantity 63.47 acres. By whom surveyed James Sperry.

199 Lot No. 61 Containing 63 47-100 acres

James Sperry's Field Notes.

South Line, beginning at the S. E. corner, post No'd 61. A butternut 20 in. di. bears S. $52\frac{1}{2}$ degrees, E. dist. 246 links, No'd. 61; A butternut 6 in. di. bears S. 32 degrees, E. dist. 227 links, No'd. 61; thence S. $75\frac{3}{4}$ degrees, w. through 1 qty. meadow on S. line of reservation 15.40 chains to N. E. corner of Indian claim to No. 62 $\frac{1}{2}$, 19.49 chains to S. W. corner to No. 61 Post No'd. 61.

Creek Line of traverse of lot No. 61 beginning at the S. W. corner described 1st over back; thence up the Creek the following courses and distances:

No. of station.	Courses.	Distances.	Remarks.
1	N $26\frac{3}{4}$ ° E	4.25	Valued at \$30 per acre
2	N $9\frac{1}{2}$ ° W	3.30	
3	N $42\frac{1}{2}$ ° W	2.40	
4	N 72° W	5.50	
5	N $76\frac{1}{2}$ ° W	2.20	
6	N $66\frac{3}{4}$ ° W	2.90	
7	N 61° W	1.50	
8	N 39° W	1.20	
9	N $66\frac{1}{2}$ ° W	0.90	
10	N $27\frac{1}{2}$ ° W	2.60	
11	N $43\frac{1}{4}$ ° W	3.20	
12	N $23\frac{1}{2}$ ° W	2.50	
13	N $14\frac{1}{2}$ ° W	2.00	
14	N 10° W	2 70	
15	N $4\frac{1}{2}$ ° W	7.10	
16	N 15° E	1.20	

17	N 84½° E	0.64
18	S 62¾° E	1.10
19	S 45½° E	3.30

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20	S 56½° E	1.40	
21	S 61½° E	1.60	
22	S 81° E	3.00	
23	N 76° E	7.50	
24	S 88° E	2.25	
25	S 77½° E	1.50	
26	S 69½° E	2.90	
27	S 55° E	2.90	
28	S 36¾° E	2.00	
29	S 26½° E	1.90	
30	S 15¾° E	4.10	
31	S 15° E	5.40	
32	S 24½° E	3.90	to small log house
33	S 38½° E	4.00	and barn
34	S 44¼° E	5.25	to the S. E. corner
and place of beginning. Con. 63.47 A.			

PLAINTIFF'S DEED EXHIBIT No. 3, LOT 178.

Deed dated June 26, 1845, made by Joseph Fellows under the same title as deed exhibit No. 1, to Benjamin W. Rogers and Richard H. Ogden, sole acting executors, etc., of Thomas L. Ogden, recorded in Erie County Clerk's Office in Liber 78 of Deeds at page 43, August 22, 1845.

The description of the deed is as follows:

All those 2 certain lots, pieces or parcels of land being part of that tract of land called the Buffalo Creek Reservation heretofore occupied by the Seneca Tribe or Nation of Indians being situate in the town of Black Rock in the County of Erie, in township No. 10 of the eighth range of townships and distinguished on the survey and map made by Lovejoy & Emslie of that part of the said reservation tract which is situate near the City of Buffalo by the Nos. 176 and 178, said lot No. 176 containing five acres and ten hundredths of an acre and lot No. 178 containing 37 acres and eighty-nine hundredths of an acre of land be the same more or less.

Field Notes, Lot 78.

The description of Lot 178 as it appears in the field notes of Lovejoy & Emslie is as follows:

Beginning at a post marked 175, 176, 178, 179, being the north-west corner; running from thence S. 49¼ S. 13.22 or to a post standing on northerly bank of Buffalo Creek marked 177, 178; thence along bank of said creek (down stream) following courses and distances S. 35½, W. 3.49, S. 14¾, W. 4.08, S. 14½, E. 3.65, S.

27½, E. 9.30, S. 35¼, E. 3.87, S. 9, E. 1.78, S. 36½, W. 3.15, N. 80¾, W. 4.42, N. 47.50, W. 10.32, N. 41.20, W. 3.83, N. 28, W. 3.85 N. 13¾, W. 8.54, N. 29½ W. 4.60 to a post marked 178, 186; thence N. 40.45, E. 11.52 to place of beginning, containing 37 89-100 acres.

Description: This lot is all under good improvement, land, first rate loamy soil.

Value per acre \$68.

Deed dated July 2, 1855, made by Joseph Fellows under the same title as deed exhibit No. 1, to D. P. Campbell and Jesse Ketchum, recorded in Erie County Clerk's Office in Liber 145 of Deeds at Page 47, September 27, 1855.

PLAINTIFF'S DEED EXHIBIT No. 4, LOT 194.

The description in the deed is as follows:

"All that certain lot, piece or parcel of land, situate in the City of Buffalo in the County of Erie and State aforesaid, being part of the tract of land called the Buffalo Creek Reservation heretofore occupied by the Seneca Tribe or Nation of Indians known and distinguished as Lot No. 194 of the Lovejoy & Emslie survey adjoining the City of Buffalo, in Township 10, Range 8, containing five acres and thirty-six hundredths of an acre, be the same more or less, as surveyed by said Lovejoy & Emslie.

Field Notes, Lot 194.

The description of lot 194 as it appears in the field notes of Lovejoy & Emslie is as follows:

Beginning at a post standing on northerly bank of Buffalo Creek marked 194, 196, running from thence N. 15.23, E. 2.21 to a post marked 194, 195, 196 being the N. E. corner; thence N. 61.56, W. 6.10 to a post marked 133, 193, 195; thence S. 40.45, W. 12.06 to a post standing on northerly line of Abbot Road marked 193, 194; thence along said road S. 49¼, E. 2.25 to a post standing on north-west bank of the Buffalo Creek marked 194; thence along the bank of said creek (up stream) following courses and distances N. 54½, E. 4.46, N. 61¼, E. 2.58, N. 58.35, E. 5.05, S. 78¼, E. 1.65 to place of beginning, containing 5 36-100 acres. This lot is dry and good loamy soil nearly all under good improvement. Value per acre \$75.

PLAINTIFF'S DEED EXHIBIT No. 5, LOT 196.

A deed dated January 1, 1845, made by Joseph Fellows and others under the same title as deed exhibit No. 1, to Henry Lamb, recorded in Erie County Clerk's Office in Liber 81 of Deeds, page 6, July 11, 1845.

The description in the deed is as follows:

"All that certain lot, piece or parcel of land, situate in the town of Black Rock in the County of Erie and State aforesaid, being part

of the tract of land called the Buffalo Creek Reservation heretofore occupied by the Seneca Tribe or Nation of Indians, known and distinguished as lot No. 196 of Lovejoy & Emslie's survey, adjoining the City of Buffalo, in Township No. 10 in the eighth range of townships, containing eighteen acres and ninety-two hundredths of an acre, be the same more or less.

Field Notes, Lot 196.

The description of Lot 196 as it appears in the field notes of Lovejoy & Emslie is as follows:

Beginning at a post standing on northerly bank of Buffalo Creek marked 196, 197, being S. E. corner, running from thence N. 15.23, E. 21.87 to a post standing on S. line of Elk Street, marked 196, 197; thence along S. line of said street, N. 74.37, W. 10.00 to a post marked 195, 196; thence S. 15.23, W. 15.56 to a post marked 194, 196 standing on N. bank of Buffalo Creek; thence along the bank of said creek (up stream) the following courses and distances: S. 37, E. 5.45, S. 54 $\frac{1}{4}$, E. 3.43, S. 39, E. 3.11 to place of beginning. Containing 18 92-100 acres.

Description: This lot has a low swamp hole on it near S. end made by a small Creek; otherwise it is dry good land and partly improved. Value per acre \$60.

PLAINTIFF'S DEED EXHIBIT No. 6, Lot 59.

A deed dated January 1st, 1845, made by Joseph Fellows, under the same title as deed exhibit No. 1, to Helen Stone, recorded in Liber 81 of Deeds at page 108, February 19, 1847.

The description of the deed is as follows:

"All that certain lot, piece or parcel of land situate in the town of Black Rock, in the County of Erie and State aforesaid, being part of the tract of land called the Buffalo Creek Reservation, heretofore occupied by the Seneca Tribe or Nation of Indians, known and distinguished as Lot No. 59, in Township No. 10 in the eighth range of townships, containing fourteen acres and forty hundredths of an acre, as surveyed by James Sperry, be the same more or less.

Field Notes, Lot 59.

The description of Lot 59 as it appears in the field notes of James Sperry is as follows:

Lot No. 59, containing 14 40-100 acres.

South Line, beginning at the N. E. corner on S. bank of Buffalo Creek, post No'd. 56 and 59. A butternut 36 in. di. bears S. 78 $\frac{1}{2}$, W. dist. 61 links, No'd. 59; thence S. 49 $\frac{1}{2}$ W. through 1st qty. meadows flats, 1.00 chain to the S. E. corner, post No'd. 56, 57, 58 and 59. An elm 36 in. di. bears N. 37 $\frac{1}{2}$ W. dist. 91 links No'd. 59. A soft maple 5 in. di. bears S. 43 $\frac{1}{2}$ W. dist. 151 links No'd. 58; thence

N. 45, 25 W. through 1st qty. flatts in meadows 78 links to E. bank of ravine old bed partly filled up, 3.46 chains to W. bank and in 1st qty. improved flatts. 10.00 chains to E. end of turnpike—cultivated. 16.28 chains to N. W. corner of No. 58 in center of turnpike; thence $52\frac{1}{4}$ W. along center of turnpike 1st qty., soil 4.27 chains to S. W. corner of the lot on post driven in even with surface. Post No'd. 59 and set 25 links N. in ditch. There was once a bridge across the creek here and at some future day probably there will be another and a road direct into Buffalo. The City is in fair view from this point.

West and North Line, beginning at the S. W. corner; thence up the creek the following courses and distances:

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No. of station.	Courses.	Distances.	Remarks.
1	N 62° E	4.50	All 1st quality al-
2	N $57\frac{1}{2}^{\circ}$ E	2.70	luvial flats, etc., well
3	N $44\frac{1}{2}^{\circ}$ E	2.40	improved, except two
4	N $71\frac{1}{4}^{\circ}$ E	0.67	acres in a strip around
5	N $87\frac{1}{2}^{\circ}$ E	1.00	adjoining the creek.
6	S $46\frac{1}{4}^{\circ}$ E	1.30	
7	S $91\frac{1}{2}^{\circ}$ E	2.30	
8	S $57\frac{1}{2}^{\circ}$ E	4.80	
9	S $32\frac{1}{2}^{\circ}$ E	2.40	
10	S $7\frac{1}{2}^{\circ}$ E	1.30	
11	S $10\frac{1}{2}^{\circ}$ W	4.00	
12	S $2\frac{1}{4}^{\circ}$ W	1.90	
13	S $23\frac{3}{4}^{\circ}$ E	2.10	
14	S 17° E	183	to the N. E. corner

and place of beginning, containing 14 40-100 acres. Valued at \$25 per acre.

PLAINTIFF'S DEED EXHIBIT NO. 7, LOT 60.

A deed dated January 1, 1845, made by Joseph Fellows, under same title as deed Exhibit No. 1, to Richard Evans, recorded in Erie County Clerk's Office in Liber 81 of Deeds at page 119, August 3, 1847.

The description in the deed is as follows:

"All that certain lot, piece or parcel of land, situate in the Town of Black Rock in the County of Erie and State aforesaid, being part of the tract of land called the Buffalo Creek Reservation, heretofore occupied by the Seneca Tribe or Nation of Indians known and distinguished as Lot No. 60 in Township No. 10, in the eighth range of townships containing 30 acres and twenty-two hundredths of an acre, as surveyed by James Sperry, be the same more or less."

Field Notes, Lot 60.

The description of Lot 60 as it appears in the field notes of James Sperry is as follows:

206 "Lot No. 60 containing 30 22-100 acres west of Range Line.

East Line, beginning at the N. E. corner post No'd. 58 and 60 set in the ditch 32 links S. 2 degrees W. of the corner in the center of turnpike; thence S. 2 degrees west through 1st qty. improved flats in oats, 13.84 chains to a wet patch of $1\frac{1}{2}$ acres 5th quality 17.00 chains through the wet to land much worn, improved 2nd qty. 22.84 chains into 3rd. qty., grass land wet 32.84 chains to S. E. corner post No'd. 58 and 60 set at angle, post No. 11 old survey, no bearers.

South Line, beginning at S. E. corner described first over back thence N. $67\frac{1}{2}$ degrees, W. through 5 qty. wet land narrow 4.75 chains to large deep ditch to drain swamps S. on line improved 5.25 chs. to turn in fence including $1\frac{1}{2}$ A. in south field 1st qty., 12.50 chains to S. W. corner, post No'd. 60 and set on S. bank of creek. N. E. corner of a log house bears S. $34\frac{1}{2}$ degrees, E. dist. 67 links, N. W. corner to a plank house bears S. $69\frac{1}{2}$ degrees, E. dist. 135 links No'd. 60.

West Line, beginning at the S. W. corner described above, thence up creek the following courses and distances:

No. of stations.	Courses.	Distances.	Remarks.
1	N 75 E	4.52	
2	N $35\frac{1}{2}$ E	3.30	
3	N $14\frac{1}{4}$ E	1.80	
4	N $18\frac{1}{4}$ W	1.40	
5	N $21\frac{3}{4}$ W	2.10	
6	N 29 W	1.80	
7	N $34\frac{1}{2}$ W	2.70	
8	N $27\frac{1}{4}$ W	2.40	
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9	N $36\frac{3}{4}$ W	1.20	
10	N 30 W	2.30	
11	N $25\frac{1}{4}$ W	1.90	
12	N $11\frac{3}{4}$ W	1.70	
13	N $\frac{3}{4}$ E	1.50	
14	N $6\frac{1}{4}$ E	0.94	
15	N 17 E	1.80	
16	N $29\frac{1}{2}$ E	0.75	
17	N $42\frac{1}{4}$ E	1.12	
18	N $55\frac{1}{2}$ E	1.00	
19	N 60 E	0.90	
20	N $61\frac{3}{4}$ E	2.48	
21	N $69\frac{1}{4}$ E	5.00	

to the N. W. corner in center of road post No'd. 60 and set 25 degrees S. in ditch another driven in at the corner even with surface.

North Line, beginning at the N. W. corner described 1st back; thence S. $52\frac{1}{4}$ degrees E., along the center of cultivated turnpike 1st qty. 4.27 chains to N. E. corner and place of beginning, containing 30 22-100 acres. Value at \$27.00 per acre."

208 Traverse of the creek from S. W. corner of No. 60 to S. E. corner of No. 61, beginning at the S. W. corner of No. 60 described in survey of S. line of No. 60 thence 1st N. $84\frac{1}{2}$ degrees W. 4.00 chains 2nd N. $48\frac{1}{2}$ degrees W. 6.00 chains to the S. E. corner of No. 61.

PLAINTIFF'S EXHIBIT, DEED OF OGDEN GORE RECORDED IN LIBER
13, PAGE 48.

This indenture made this first day of February, in the year of our Lord, one thousand eight hundred and thirty-one between Wilhelm Willink, Walrave Van Hurkelom, Jan Van Eghen, 208 Cornelis Isaac Vander Vleit, Wilhelm Willink, the younger, and Pieter Van Eghen, all of the City of Amsterdam, in the Kingdom of the United Netherlands by David E. Evans, their attorney, of the first part, and Bela D. Coe, of the County of Erie, and State of New York, of the second part, witnesseth that the said party of the first part, for and in consideration of the sum of two thousand nine hundred and eleven dollars and fifty cents to them in hand paid by the said party hereto of the second part, the receipt whereof is hereby acknowledged, and themselves to be therewith fully satisfied, contented and paid, have granted, bargained, sold, aliened, released, enfeoffed, conveyed, confirmed and assured, and by these presents, do grant, bargain, sell, alien, release, enfeoff, convey, confirm and assure, unto the said party of the second part, and to his heirs and assigns forever,

All that certain tract of land, situate, lying and being in the County of Erie, in the State of New York, being part or parcel of a certain township, which on a map or survey of divers, tracts, or townships of land of the said party of the first part, made for the proprietors by Joseph Ellicott, surveyor, is distinguished by part of township number eleven, in the eight range of said townships bounded as follows, viz:

Beginning at a post on the shore of Lake Erie from which a hickory tree bears north forty-three degrees, east one chain twenty-five links, a black ash tree blazed on two sides bears north sixty-seven degrees, east one chain, eleven links, from thence north sixty-seven degrees, east twenty chains to a corner of Buffalo Creek Reservation, said corner being on the bank of Buffalo Creek, at 209 the mouth of a small creek which enters Buffalo Creek below said corner as established by a survey of said Reservation made by Augustus Porter, October 19, 1798, at which corner a white ash tree twelve inches in diameter was then standing, thence bounding on said Reservation, the following course and distances as run by said Augustus Porter, to-wit: South sixteen degrees, east fifteen chains, south sixty-six degrees, east twenty-four chains, fifty links

to a post on the southwest bank of said Buffalo Creek, south twenty-five degrees, east five chains, south forty-three degrees, east seven chains, south sixteen degrees, east ten chains, north eighty-two degrees, east twenty-two chains, fifty links, north ten degrees, east nineteen chains, north seventy-five degrees, east nineteen chains eighty links, south fifty degrees, east six chains, south eighty-six degrees, east four chains, south sixty-nine degrees, east twelve chains fifty links, north sixty degrees, east fourteen chains, south seventy-five degrees, east seventeen chains, south forty degrees, east twenty-eight chains, south forty-five degrees west fourteen chains, south sixteen degrees, west eighty-eight chains, south twenty degrees, east thirty-five chains, south sixty-six degrees, west forty chains, north fifty degrees, west twenty chains, north fifty-eight degrees, west twenty-two chains, south sixty degrees, west seventeen chains, thence leaving the bounds of said Reservation south seventy-eight degrees, west six chains to the shore of Lake Erie and thence north-westerly along the said shore to the place of beginning, containing one thousand six hundred and seventy-six acres, be the same more or less, according to the plan laid down in the margin hereof.

210 (Here follows Labendum and other clauses and covenants.)

In Witness Whereof, the party of the first part have hereunto set their hands and seals the day and year first above written.

WILHEM WILLINK,	[L. S.]
WELRAVE VAN HENKELOM,	[L. S.]
JAN VAN EGHEN,	[L. S.]
CORNELIS ISAAC VANDER VLETT,	[L. S.]
WILHEM WILLINK, THE YOUNGER,	[L. S.]
PIETER VAN EGHEN,	[L. S.]

By Their Attorney,

DAVID E. EVANS.

Scaled and Delivered in the presence of
A. VAN TUYL.

(Duly acknowledged map annexed.)

Statement as to Defendant's Title.

The defendant's counsel read in evidence certain documents set forth in Assembly Document No. 51, called "Report on the Indian Problem," transmitted to the N. Y. legislature February 1, 1889. Therein contained is a history of the Buffalo Creek Indian Reservation, which was acquired by the so-called "Ogden Land Co.," to whose interest C. E. Appleby as surviving trustee succeeded. The following is a summary:

Page 94 "Indian Problem." King James of England granted in 1628 to the colony of Massachusetts Bay all that part of America lying between 40 degrees and 48 degrees N. Lat. and in breadth from sea to sea, together with all the land, soil, ground, havens, ports, rivers, waters, fishing mines, minerals, precious stones, quar-

ries and all and singular other commodities, jurisdictions, royalties, privileges, franchises, etc.

Page 16 "Indian Problem" states that "soon after the treaty of Ft. Stanwix in 1784 conflicting claims to a tract of land in the

Western part of this state arose between Massachusetts and
211 New York, the former claiming title under the grant from

King James I to the Plymouth Colony and the latter under the grant from King Charles II to the Duke of York and Albany. The dispute was compromised by commissioners on the part of each state, 4 from Massachusetts and 6 from New York, at Hartford, Conn., Dec. 16, 1786, Massachusetts ceding to New York the 'government sovereignty and jurisdiction' over the disputed territory and New York ceding to Massachusetts 'the right of pre-emption of the soil of the native Indians and all other estate except of sovereignty and jurisdiction to Massachusetts, its grantees and assigns forever' * * * These lands comprised about 6 million acres bounded easterly by the line which ran from the southeast corner of Steuben County, north and south along the west shore of Seneca Lake and terminating in Sodus Bay in Lake Ontario and embraced * * *

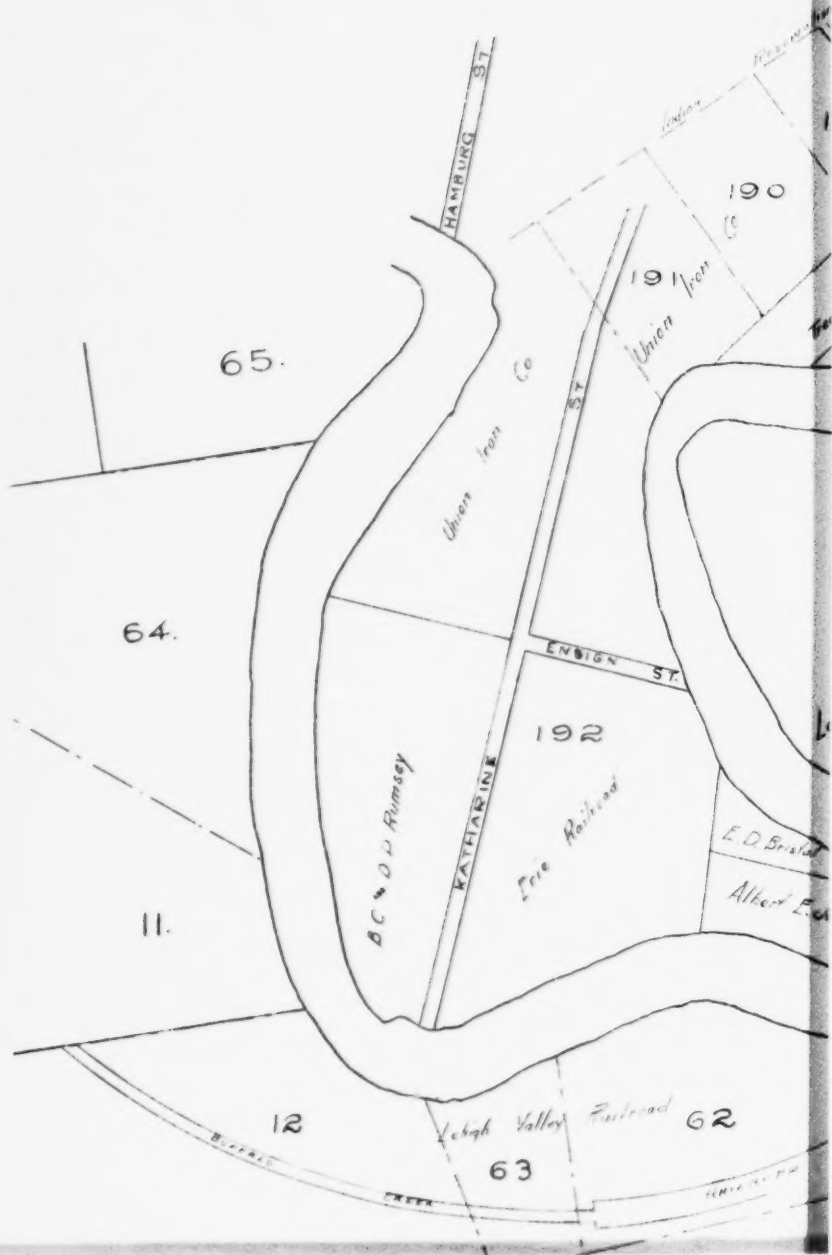
14 counties, one of which was the County of Erie. In December, 1786, the State of New York, in accordance with the compromise before mentioned, conveyed to the State of Massachusetts by deed recorded in Liber 26 of Deeds page 469, the pre-emption right' that is, the first right to purchase from the Indians, together with "all other estate except of sovereignty and jurisdiction."

On March 12, 1791, the State of Massachusetts entered into an agreement to sell the same right to Samuel Ogden, said agreement is recorded in Liber 24 of Deeds, page 408. Thereafter Samuel Ogden signed a release from the above agreement recorded in Liber

24 of Deeds, page 413, and the State of Massachusetts conveyed the lands here in question to Robert Morris by deed
212 recorded in Liber 24 of Deeds, page 415 and 418. Thereafter Robert Morris by sheriff conveyed to Thomas L. Ogden by deed recorded in Liber 24 of Deeds, page 406, and thereafter Thomas L. Ogden, by deed dated February 18, 1801, not recorded in Erie County, conveyed to Wilhelm Willink and others, commonly known as "The Holland Land Company." The search offered in evidence by the City takes up the title at this point.

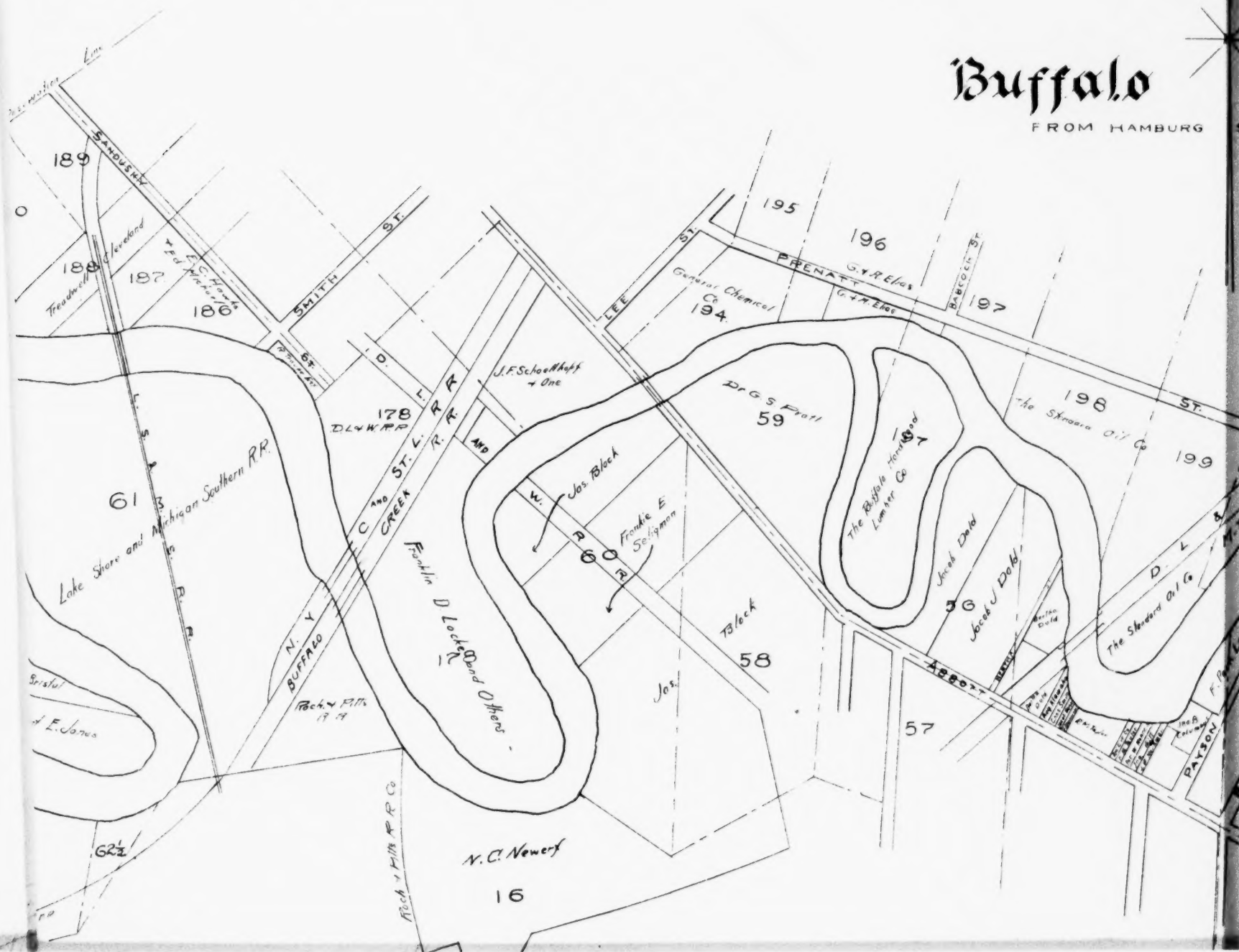
Sept. 12, 1810, Wilhelm Willink and others conveyed by deed recorded in Liber 1 p. 68 all their interest in the Buffalo Creek Reservation and other lands, subject to the Indian rights, to David A. Ogden.

By treaty dated January 15, 1838, recorded in Liber 82 of Deeds, page 1, August 27, 1845, the Seneca Nation of Indians conveyed all their interest in the Buffalo Creek Indian Reservation to Thomas L. Ogden and Joseph Fellows, as joint tenants, and by deed dated May 20, 1842, recorded in Liber 106 of Deeds, page 194, the Indians confirmed the above mentioned treaty. Charles E. Appleby, as sole surviving trustee, became vested with the titles acquired from the States of New York and Massachusetts and from the Indians.



Buffalo

FROM HAMBURG



No. 162 }
Apples } p. 214.
Buffalo }

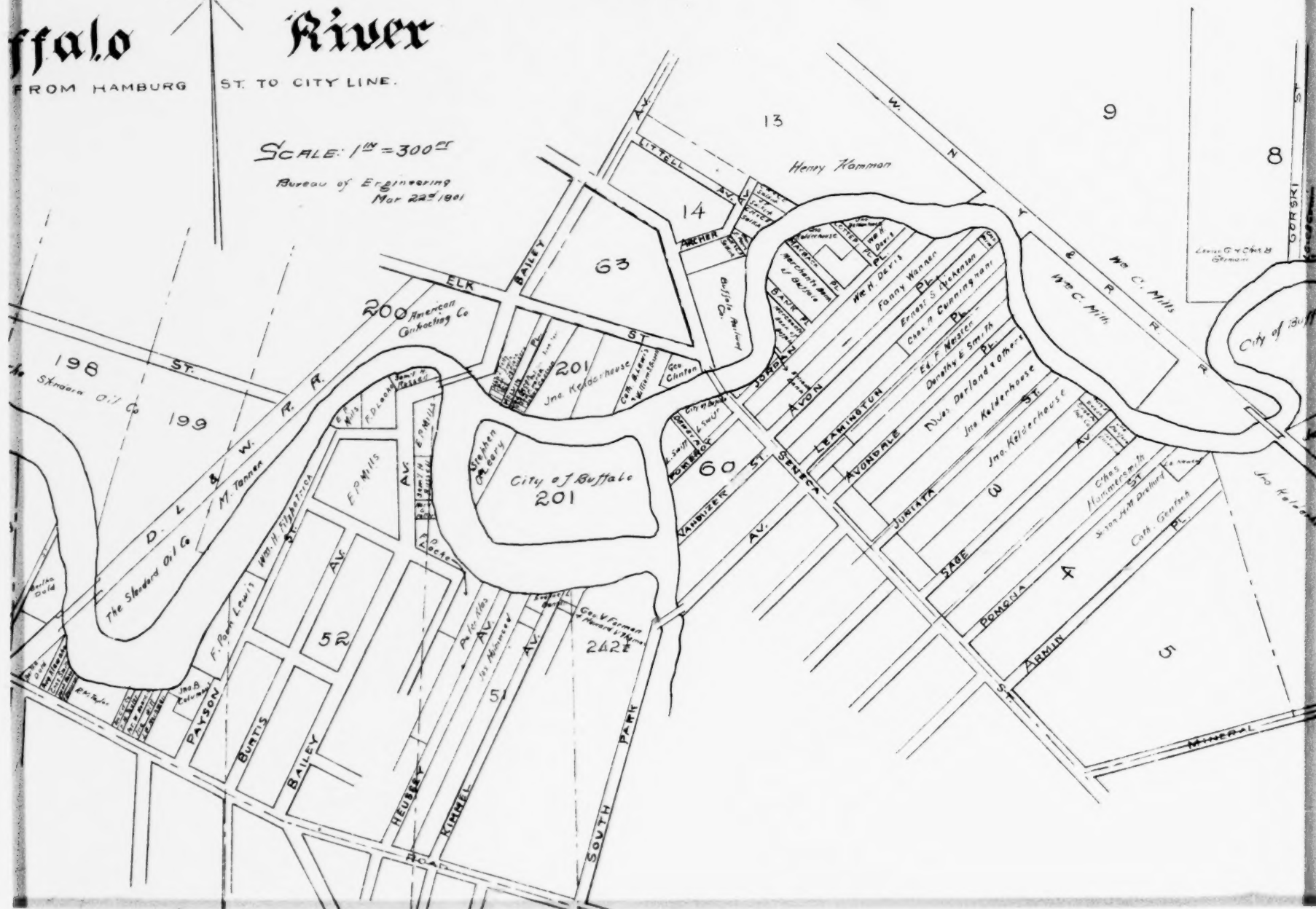
ffalo

River

FROM HAMBURG ST. TO CITY LINE.

SCALE: $1'' = 300'$

Bureau of Engineering
Mar 22^d 1901



The Ogden Land Company, so-called, was simply a Company of joint owners with the title to their property vested in trustees as joint tenants.

The defendant offered in evidence the following conveyances: The State of New York to the State of Massachusetts (Deed, dated Dec. 16th, 1786, recorded in Liber 26, of Deeds, page 469 Apr. 6th, 1835). The State of Massachusetts to Samuel Ogden (Agreement to convey, dated March 12th, 1791, recorded in Liber 24, of Deeds, page 408 Nov. 6th, 1834); Samuel Ogden to The State of Massachusetts (Release from agreement, dated May 11th, 1791, recorded in Liber 24, of Deeds, page 413 Nov. 6th, 1834); the State of Massachusetts to Robert Morris (Deed, dated May 11th, 1791, recorded in Liber 24, of Deeds, page 415, November 6th, 1834); Same to Same (Deed, dated May 11th, 1791, recorded in Liber 24, of Deeds, page 418 November 6th, 1834). This deed delivered as an escrow; Robert Morris, by sheriff, to Thomas L. Ogden (Sheriff's deed, dated May 12th, 1800, recorded in Liber 24, of Deeds, page 406 November 6th, 1834); Thomas L. Ogden to Wilhelm Willink, et al. (Deed dated February 18th, 1801. Not recorded in Erie County).

As appears from the "Case" either party may on the argument read from any of the foregoing deeds or other documentary evidence not printed in full.

Case settled, signed and ordered filed this 1st day of May, 1905.

DANIEL J. KENEFICK, *J. S. C.*

(Here follow maps marked pp. 214, 215, and 216.)

Order of Reversal.

At a Term of the Appellate Division of the Supreme Court of the State of New York in and for the Fourth Judicial Department, at the City of Rochester, Commencing on the 13th Day of November, 1906.

Present:

Honorable Peter B. McLennan, Presiding Justice.
Honorable Alfred Spring,
Honorable Pardon C. Williams,
Honorable Edwin A. Nash,
Honorable Frederick W. Kruse,
Associate Justices.

In the Matter of the Application of THE CITY OF BUFFALO to Acquire Lands Under the Waters of the Buffalo River for the Purposes of a Public Highway.

C. E. APPLEBY, as Trustee, etc., Appellant.

The above named C. E. Appleby, as Surviving Trustee of the Ogden Land Company, called Seneca Reservations, in this action, having appealed to the Appellate Division of the Supreme Court, Fourth Department, from an order of the Supreme Court, 218 entered in the office of the Clerk of the County of Erie, on the eighth day of January, 1902, confirming the report of the Commissioners herein; and the order made on the motion made by said Trustee to set aside said report, etc.; and the said appeal having been argued by Mr. O. O. Cottle, of counsel for the appellant, and by Mr. Samuel F. Moran, of counsel for the respondent, and due deliberation having been had thereon.

It is hereby ordered that the orders so appealed from be and hereby are reversed and a rehearing ordered before new commissioners to be appointed by the Special Term, with costs to the appellant to abide the event.

Opinion by McLennan, P. J. All concur.

NEWELL C. FULTON, *Clerk.*

Entered 28 day of December, 1906.

219 *Opinion of the Appellate Division.*

Supreme Court, Fourth Appellate Division.

In the Matter of the Application of THE CITY OF BUFFALO to Acquire Lands Under the Waters of the Buffalo River for the Purposes of a Public Highway.

C. E. APPLEBY, as Surviving Trustee, etc., Appellant.

Argued at November Term, 1906.

Decided December 28th, 1906.

Present: McLennan, Presiding Justice; Spring, Williams, Nash, Kruse, Associate Justices.

220 Appeal from an order entered in the office of the Clerk of Erie County on the 8th day of January, 1902, made at a Special Term of the Supreme Court held in and for said County, confirming the report of commissioners appointed pursuant to the Revised Charter of the City of Buffalo, to ascertain the just compensation to be paid to the owners for the taking of the fee of the bed of the Buffalo River between the Buffalo Creek Indian Reservation line and the easterly line of said city. The award made was nominal, it being determined that six cents was the value of the river bed as it winds and turns between the points above indicated.

O. O. Cottle, for appellant.

Samuel F. Moran, for respondent.

McLENNAN, P. J.:

This proceeding was commenced, so far as the appellant is concerned, by notice served by the Corporation Counsel of the City of Buffalo to the effect that on the 3d day of June, 1901, application would be made for the appointment of three commissioners to ascertain the just compensation to be made to the owners of or persons interested in the property sought to be acquired, and pursuant 221 to such notice on June 5th, 1901, commissioners herein were appointed. Previous thereto the Board of Aldermen of the City of Buffalo had adopted a resolution, as it is claimed pursuant to Title XX of the Revised City Charter, indicative of its intention to acquire the property in question, and thereafter declared by resolution its intention to take the same under the provisions of the Charter. Pursuant to the notice for the appointment of commissioners the appellant appeared but failed to raise any question as to the regularity of the proceeding, and therefore, we think, is estopped from raising any such objection upon this appeal. (Matter of Cooper, 93 N. Y., 507). So that it is considered that the only question presented by this appeal is the adequacy of the award.

We think it cannot be reasonably contended that the ownership of the fee of the bottom of the Buffalo River, as described in the petition and as shown by the map which is a part thereof, is not as to the owner a valuable property. It is hardly useful to speculate as to the uses to which the property might not be put which would not in any manner interfere with the use acquired by the public. A change in the river's course might be effected which would improve its use as a public highway and yet leave many acres of
222 land dry and free from the overflow of such river and which might be of great value to the owner. So again, many structures might be erected crossing such river which would require the consent of the owners of the fee, but which would in no manner affect its use as a navigable stream, if it may be so denominated. The evidence indicates that the course of the river in question from the earliest times has been changing; that portions occupied by such river in the past have since become some of the most valuable property in the city. It seems probable from the evidence that such change may take place in the future, and if so, the owner would have a considerable amount of land belonging to him which would not be subject to overflow and which he might sell the same as any other owner of property. We think the citation of authorities is unnecessary to demonstrate that the appellant was the owner of valuable property which consisted of the bed of the Buffalo River which the City of Buffalo by this proceeding has attempted to acquire. By the award of the commissioners the property and rights of the appellant have been determined to be of no value; indeed, the basis of the order appealed from is that the property of the owner was of no value as to him and therefore that the other party could acquire the same without paying any compensation therefor. We think the determination is abhorrent to justice and to any rule of equity which has been enunciated by the courts in any well considered case. If the fee to the bed of the river in question is of
223 no value, why does the City of Buffalo seek to acquire the same? The evidence shows conclusively that such property is valuable; the exact value may be difficult to determine, but that it is more than nominal is conclusively established. How appellant's property may be made available or at present valuable does not definitely appear, but that it has an intrinsic value cannot under the evidence be doubted. By this proceeding and by the award it is practically asserted by the City of Buffalo that it wishes to take property from the owner on the theory that it is of no value or use to such owner and to appropriate the same to its own use. No question of public policy is involved. There is no suggestion in this proceeding that the City could manage or control the fee of the bed of the river in such manner as would better protect the citizens of the city or as would better subserve the general interests of the public. So far as we are informed the only purpose of the City is to acquire for nothing a property, solely upon the ground that such property is of no value to the owner.

The order appealed from should be reversed and new commissioners appointed by the Special Term to determine the compensa-

tion which should be paid to the owner of the premises in question, with costs to the appellant to abide event.

All concur.

224 *Order Allowing Appeal and Certifying Questions.*

At a Term of the Appellate Division of the Supreme Court of the State of New York in and for the Fourth Judicial Department, at the City of Rochester, on the 5th day of March, 1907.

Present:

Honorable Peter B. McLennan, Presiding Justice.

Honorable Alfred Spring,

Honorable Pardon C. Williams,

Honorable Frederick W. Kruse,

Honorable James A. Robson,

Associate Justices.

Supreme Court, Appellate Division, Fourth Department.

In the Matter of the Application of THE CITY OF BUFFALO to Acquire Lands Under the Waters of the Buffalo River for the Purposes of a Public Highway.

This Court having on the 28th day of December, 1906, duly made and entered an order reversing an order of the Erie Special Term, of the Supreme Court, entered in the office of the Clerk of the County of Erie on the 8th day of January, 1902, confirming
225 the report of the commissioners herein, and the order made on the motion to set aside said report, and the said City of Buffalo having on the 5th day of March, 1907, duly moved before this Court for a certificate allowing an appeal from said order of reversal of this Court to the Court of Appeals and for the certification of appropriate questions to be reviewed on such appeal; and said motion having been brought on and heard upon the notice of motion and the brief of Louis E. Desbecker, Corporation Counsel, and Samuel F. Moran, of Counsel for the City of Buffalo, and upon all the papers herein and all proceedings had and taken in this proceeding; and after reading and filing the written objections to the motion on the ground that it was too late because it was not made at the term at which the order of reversal was granted or at the next term thereafter, and after reading and filing the affidavit of Octavius O. Cottle, verified March 1, 1907, and the reply brief and affidavit, verified March 5, 1907, of Samuel F. Moran, Esq., Assistant City Attorney, and the brief in opposition to said motion, submitted in behalf of said Charles Edgar Appleby, as Surviving Trustee of the Ogden Land Company, by Mr. Octavius O. Cottle, of Counsel for said Trustee, and after hearing the objections of the defendant as to the questions to be submitted and their form, it is

226 Ordered, that said motion for a certificate allowing the City of Buffalo to appeal to the Court of Appeals be and the same hereby is granted, this Court certifying that the following questions of law have arisen which in its opinion ought to be reviewed by the Court of Appeals, to wit:

I. Is Charles E. Appleby, as surviving Trustee of the Ogden Land Company, under the facts in this proceeding, entitled to an award of more than six cents damages on the City of Buffalo acquiring the fee to the lands under the waters of the Buffalo River in eminent domain proceedings, taken pursuant to its Revised City Charter, for the purposes of a public highway?

II. Were the appraisal commissioners authorized and empowered, under the facts in this proceeding, to fix the actual damages of Charles E. Appleby, as surviving trustee of the Ogden Land Company, on the City of Buffalo acquiring the fee to the lands under the waters of the Buffalo River at six cents, and to award said sum as and for the just compensation to be made to said Charles E. Appleby, as surviving trustee of the Ogden Land Company?

III. Does the City of Buffalo in this proceeding show a necessity for acquiring the fee of said lands?

IV. Did any of the exceptions call for a reversal of the order confirming the appraisal commissioners' report?

NEWELL C. FULTON.

Entered March 6, 1907.

227 *Notice of Appeal to Court of Appeals.*

Supreme Court, Erie County.

In the Matter of the Application of THE CITY OF BUFFALO to Acquire Lands Under the Waters of the Buffalo River for the Purposes of a Public Highway.

SIRS: Please take notice that the City of Buffalo, pursuant to the certificate or order of the Appellate Division, Supreme Court, Fourth Department herein, entered March 6, 1907, hereby appeals to the Court of Appeals from the order of said Appellate Division herein, entered in the office of the Clerk of the Appellate Division on the 28th day of December, 1906, and in the Clerk's office of the County of Erie, at Buffalo, N. Y., on the 9th day of January, 1907, reversing the order of Erie Special Term, entered herein in the office of the Clerk of the County of Erie on the 8th day of January, 1902,

228 confirming the report of commissioners herein and the order made on the motion to set aside said report, and from the whole and every part of said order.

Dated, Buffalo, N. Y., March 26, 1907.

Yours, etc.,

LOUIS E. DESBECKER,

Corporation Counsel, 31 City and County Hall,

Buffalo, N. Y.

To John H. Price, Esq., Clerk of the County of Erie; Octavius O. Cottle, Esq., Attorney for Charles E. Appleby, as Surviving Trustee of the Ogden Land Co.

229 *Affidavit Relative to Opinions.*
Supreme Court, Erie County.

In the Matter of the Application of THE CITY OF BUFFALO to Acquire
Lands Under the Waters of the Buffalo River for the Purposes of
a Public Highway.

STATE OF NEW YORK,
County of Erie, City of Buffalo, ss:

Samuel F. Moran, being duly sworn, deposes and says that he is
Assistant City Attorney of the City of Buffalo and its counsel
in the above entitled proceeding. That he has had charge of the
same since the first day of January, 1906. That a full and correct
copy of the opinion of the Appellate Division, rendered upon the
decision of the appeal herein, is printed in the accompanying papers.
That no opinion was written by the Judge presiding at Special Term
on the confirmation of the commissioners' report herein nor
230 upon the denial of the motion for an order to set aside such
report, as deponent is informed and verily believes.

SAMUEL F. MORAN.

Sworn to before me this 22d day of April, 1908.

JACOB STEGMAN,
Com'r of Deeds, Buffalo, N. Y.

231 *Stipulation in Lieu of Clerk's Certificate.*
Supreme Court, Erie County.

In the Matter of the Application of THE CITY OF BUFFALO to Acquire
Lands Under the Waters of the Buffalo River for the Purposes of
a Public Highway.

Pursuant to Section 3301 of the Code of Civil Procedure and
Rule 41 of the General Rules of Practice of the Supreme Court:

It is hereby stipulated, by and between the parties hereto, by their
respective attorneys, that the foregoing notices of appeal, motion
papers, case and exceptions, commissioners' report, order confirming
the same, motion papers for order to set aside said report, order
denying such motion, order of reversal by Appellate Division, opin-
ion of Appellate Division and order allowing appeal and certifying
questions are full, true and correct copies of the original of each and
all of said papers in this proceeding, and of the whole thereof,
232 entered and on file in the office of the Clerk of the County of
Erie, and the same may be used and filed with the same force
and effect as if certified by the Clerk of the Court, certification by
said Clerk being hereby waived.

Dated, Buffalo, N. Y., April 22, 1907.

LOUIS E. DESBECKER,
Attorney for City of Buffalo, Appellant.
O. O. COTTLE,
Attorney for Respondent.

Opinion of Court of Appeals.

In the Matter of the Application of THE CITY OF BUFFALO to Acquire Lands Under the Waters of the Buffalo River for the Purposes of a Public Highway.

CITY OF BUFFALO, Appellant,

CHARLES E. APPLEBY, as Surviving Trustee, etc., Respondent.

(Decided June 14, 1907.)

This is an appeal, by permission, on certified questions from an order of the Appellate Division, Fourth Department, entered in Erie County Clerk's office, January 9th, 1907, reversing an order of the Supreme Court, made at Special Term, confirming the report of commissioners appointed in the above entitled proceedings to fix the damages to be awarded for taking certain property.

Samuel F. Moran for appellant.

Edmund P. Cottle for respondent.

HISCOCK, J.:

The Buffalo River flows through a portion of the City of Buffalo into Lake Erie. Not only has it been made a public way by law, but actually for a large part of the distance through the City it is navigable by large boats entering from the lake and is a stream of much commercial importance. Prior to the commencement of these proceedings, laws were passed providing that the City of Buffalo "might (may) widen, straighten, enlarge, clear from obstruction, dredge, deepen, embank and dyke the Buffalo River (and other waters) and might (may) put and maintain in navigable condition all of said waters in the City, except Cazenovia Creek." (L. 1891, ch. 105 § 405, as am. by L. 1900, ch. 571, § 1.) These proceedings were instituted for the purpose of acquiring title to the bed of said river between certain limits in connection with or preparatory to the performance of the improvements thus authorized. They were not instituted under the general provisions of the Code applicable to condemnation proceedings, but under certain provisions (Sec. 417, etc.) of the Charter of the City of Buffalo, being Chapter 105 of the Laws of 1891. Those provisions in effect provide that the City shall have power to take lands for "streets * * * canals, basins, slips and other public waters, and for any other corporate purpose"; that the common council shall by resolution declare its intent to take the lands intended to be taken, and after certain notice shall declare by a like resolution that it has determined to take such lands; that after certain preliminary proceedings the court shall upon proper and specified notice appoint appraisers to fix the damages to be awarded for the lands taken. (L. 1891 ch. 105 sec. 417 as am. by L. 1900 ch. 571 sec 2.)

In accordance with these provisions appraisers were appointed to fix the damages to be awarded for the lands involved in these proceedings. They determined that the respondent was only entitled to nominal damages and this view was confirmed by the Special Term, but has been overruled by the learned Appellate Division, which, in reversing the order, has certified to us for answer the following questions:

1. Is Charles E. Appleby, as surviving trustee of the Ogden Land Company, under the facts in this proceeding, entitled to an award of more than six cents damages on the City of Buffalo acquiring the fee to the lands under the waters of the Buffalo River in eminent domain proceedings, taken pursuant to its revised city charter, for the purposes of a public highway?

2. Were the appraisal commissioners authorized and empowered, under the facts in this proceeding, to fix the actual damages of Charles E. Appleby, as surviving trustee of the Ogden Land Company, on the City of Buffalo acquiring the fee to the land under the waters of the Buffalo River, at six cents, and to award said sum as and for the just compensation to be made to said Charles E. Appleby, as surviving trustee of the Ogden Land Company?

236 3. Does the City of Buffalo in this proceeding show a necessity for acquiring the fee of said lands?

4. Did any of the exceptions call for a reversal of the order confirming the appraisal commissioners' report?

At first sight questions one and two seem to involve questions of fact whether upon the evidence the respondent should have been awarded more than nominal damages. But in view of the circumstances that the reversal by the Appellate Division must be deemed to have been made as matter of law (Code Civil Procedure, §§1338, 1361; *Matter of Chapman*, 162 N. Y., 456; *People ex rel. Manhattan Ry. Co. v. Barker*, 165 N. Y., 305) and of the further fact that these questions are certified to us as ones of law, we have concluded that we may interpret them as Propounding the inquiry in substance whether as matter of law the evidence presented to the commissioners entitled the respondent to an award of more than nominal damages, and upon the other hand prohibited the commissioners from awarding to him such nominal damages as just compensation.

We have no great difficulty in answering these questions to the effect that the commissioners were authorized upon the evidence presented to them if they saw fit so to do to award only nominal damages for the land sought to be acquired by the City.

237 In reaching this conclusion we have assumed as did the City in the institution of the proceedings that the respondent was vested with the fee of the river bed. Upon the other hand there does not appear to be any dispute that either by him or by the company whose rights he represents substantially all of the land abutting upon the river upon either side formerly owned by the Company has been conveyed away. This is a matter of importance as bearing upon the value of the bed of the stream, because if the bed and fee to the abutting lands were owned by the same party

it very well might be that the possible connected use of the two would be an element of much importance in passing upon the value of the bed.

Many witnesses were sworn before the commissioners in regard to the value of this bed and of the amount of the damages which should be awarded for taking it. Their evidence presented a well-defined question of fact, the testimony ranging all of the way from a valuation at nominal figures to one of very substantial amount. In addition to hearing the testimony of these witnesses the commissioners were under obligations to and we must assume did view the premises to be taken. Various theories were doubtless presented to them as they have been to us leading to the view that the lands was of substantial value. Those theories are more or less speculative.

We think that the commissioners were so justified by the
238 evidence in making the award which they did make that we cannot say as a matter of law that there was no evidence to sustain their conclusions.

We are unable to see any pertinency to the third question certified to us. If these proceedings had been instituted under the provisions of the Code it would have been necessary for the petitioner to state and show facts establishing the necessity for the acquisition of the land. (Code of Civ. Pro., §3360, subd. 3). As already pointed out, however, they were instituted under the charter of the petitioner and there has not been pointed out to us and we have been unable to find any provision which required proof herein of the necessity for acquiring the lands. The Legislature apparently has relegated the question of the propriety and necessity of acquiring premises under such circumstances as here appear to the determination of the City.

The fourth question must be answered in the negative. There are no exceptions presented for our consideration which bring up any such substantial errors as require a reversal of the order made at Special Term. Some questions appear to have been raised in the Appellate Division with reference to the sufficiency of the description of the premises to be acquired and with reference to other
239 details of procedure which were not raised in timely manner, and which, therefore, cannot now be considered.

These views would lead us to a reversal of the order made by the Appellate Division and to an affirmance of that made by the Special Term, with costs in both courts.

There is still another view which would lead us to similar result. If we should conclude that questions one and two do state questions of fact which cannot be considered by us, then treating the third question as immaterial we should have left for our consideration simply the fourth question, and there being no exceptions which call for a reversal of the order confirming the commissioners' report we should in this manner likewise come to the conclusion that the order appealed from should be reversed.

The specific answers to be made respectively to the questions certified to us are as follows:

The first question should be answered in the negative.
 The second question should be answered in the affirmative.
 The third question is immaterial and not answered.
 The fourth question should be answered in the negative.

Cullen, Ch. J., O'Brien, Edward T. Bartlett, Haight and Vann, JJ., concur; Chase J., concurs in result.

Ordered accordingly.

240 [Endorsed:] Court of Appeals. In the Matter of the Application of the City of Buffalo, to Acquire lands under the water of Buffalo River, for the purposes of a public highway. Filed Erie Co. Clerk's Office, Feb. 24" 1909.

241 STATE OF NEW YORK:

In Court of Appeals.

At a Court of Appeals for the State of New York, Held at the Capitol in the City of Albany, on the Eighth Day of October, A. D. 1907.

Present: Hon. Edgar M. Cullen, Chief Judge, presiding.

In the Matter of the Application of THE CITY OF BUFFALO to Acquire Lands under the Waters of Buffalo River for the Purposes of a Public Highway.

CITY OF BUFFALO, Appellant,

CHARLES E. APPLEBY, as Surviving Trustee, etc., Respondent.

Motions having been made upon the part of the said respondent to dismiss the appeal of the City of Buffalo to this court herein; for a reargument of such motion; for a reargument of the appeal on its merits; and to send this proceeding back to the Appellate Division for a re-settlement of the certified questions, etc., and papers having been duly submitted in support of such motions and in opposition thereto, and due deliberation having been thereupon had; it is

Ordered, That the motion to dismiss appeal be and the same hereby is denied, without costs; that the motion for reargument of motion to dismiss appeal be and the same hereby is denied, without costs; that the motion for reargument on the merits be and
 242 the same hereby is denied, with ten dollars costs; and that the motion to send back to resettle questions, etc., be and the same hereby is denied, without costs.

[SEAL.]

R. M. BEUBER,
Deputy Clerk.

243 [Endorsed:] Court of Appeals, State of New York. In the Matter of the application of The City of Buffalo, &c., City of Buffalo, App't, C. E. Appleby, &c., Resp't. Filed Erie Co. Clerk's Office, Oct. 17" 1907. 24-611.

244

Court of Appeals.

STATE OF NEW YORK, ss:

Pleas in the Court of Appeals, Held at the Capitol, in the City of Albany, on the 14th Day of June, in the Year of Our Lord One Thousand Nine Hundred and Seven, Before the Judges of said Court.

Witness the Hon. Edgar M. Cullen, Chief Judge Presiding.
W. H. Shankland, Clerk.

Remittitur, June 15, 1907.

245 In the Matter of the Application of THE CITY OF BUFFALO to Acquire Lands under the Waters of the Buffalo River for the Purposes of a Public Highway.

Be it remembered that on the 2nd day of May, in the year of Our Lord nineteen hundred and seven, the City of Buffalo, the appellant in this proceeding, came here into the Court of Appeals, by Louis E. Desbecker, corporation counsel, its attorney, and filed in said Court a Notice of Appeal and Return thereto from the order of the Appellate Division of the Supreme Court in and for the 4th Judicial Department.

And Charles E. Appleby, as surviving trustee, the respondent in said proceeding, afterward appeared in said Court of Appeals by Octavius O. Cottle, his attorney.

Which said Notice of Appeal and Return thereon filed as aforesaid, are hereunto annexed.

Whereupon, the said Court of Appeals having heard this cause argued by Mr. Samuel Moran, of counsel for the appellant, and by Mr. Edmund P. Cottle, of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be

and the same hereby is reversed and that of Special Term
246 affirmed with costs in both Courts. 1st and 4th questions certified answered in negative; 2nd question certified answered in the affirmative; 3rd question not answered.

And it was also further ordered that the record aforesaid, and the proceedings in this Court be remitted to the Appellate Division, 4th Judicial Department, there to be proceeded upon according to law.

Therefore, it is considered that the said order be reversed and that of Special Term affirmed, with costs, etc. Questions disposed of as aforesaid.

And hereupon as well the Notice of Appeal and Return thereto aforesaid as the judgment of the Court of Appeals aforesaid by them given in the premises, are by the said Court of Appeals remitted into the Appellate Division, 4th Judicial Department before the Justices thereof, according to the form of the Statute in such case made and

provided, to be enforced according to law, and which record now remains in the said Appellate Division before the Justices thereof, etc.

W. H. SHANKLAND,
Clerk of the Court of Appeals of the State of New York.

247 Court of Appeals.

CLERK'S OFFICE,
ALBANY, June 15, 1907.

I hereby certify that the preceding record contains a correct transcript of the proceeding in the Court of Appeals, with the papers originally filed therein attached thereto.

[SEAL.] W. H. SHANKLAND, *Clerk.*

248 SUPREME COURT,
Appellate Division,
Fourth Judicial Department,
Clerk's Office, Rochester, N. Y., ss:

I, Newell C. Fulton, Clerk of the Appellate Division of the Supreme Court in the Fourth Judicial Department, do hereby certify that the following is a copy of the order made by said Court upon the appeal in the above entitled action or proceeding, and entered in my office on the 11th day of October, 1907, and that the original case or papers upon which said appeal was heard are hereunto annexed.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court, at the City of Rochester, this 16th day of October, 1907.

[SEAL.] NEWELL C. FULTON, *Clerk.*

249 At a Term of the Appellate Division of the Supreme Court of the State of New York, Held in and for the Fourth Judicial Department, at the City of Rochester, on the 11th Day of October, 1907.

Present: Hon. Peter B. McLennan, Presiding Justice; Hon. Alfred Spring, Hon. Pardon C. Williams, Hon. Frederick W. Kruse, Hon. James A. Robson, Associate Justices.

In the Matter of the Application of THE CITY OF BUFFALO to Acquire Lands under the Waters of the Buffalo River for the Purposes of a Public Highway.

CITY OF BUFFALO, Appellant.

CHARLES E. APPLEBY, as Surviving Trustee of the Ogden Land Company, Respondent.

An order having been duly made and entered in the above entitled proceeding on the 6th day of March, 1907, allowing the City of

Buffalo to appeal to the Court of Appeals from the order of this Court, entered in the office of the Clerk of this court December 28, 1906, and in Erie County Clerk's office January 9, 1907, reversing the order of Erie Special Term, entered herein in the office
250 of the Clerk of the County of Erie on the 8th day of January, 1902, confirming the report of commissioners herein and the order entered February 10, 1902, denying the motion to vacate such order of confirmation, and this court having certified for review by the Court of Appeals, questions as follows:

1. Is Charles E. Appleby, as surviving trustee of the Ogden Land Company, under the facts in this proceeding, entitled to an award of more than six cents damages on the City of Buffalo acquiring the fee to the lands under the waters of the Buffalo river in eminent domain proceedings, taken pursuant to its revised city charter, for the purposes of a public highway?

2. Were the appraisal commissioners authorized and empowered, under the facts in this proceeding, to fix the actual damages of Charles E. Appleby, as surviving trustee of the Ogden Land Company, on the City of Buffalo acquiring the fee to the lands under the waters of the Buffalo River at six cents, and to award said sum as and for the just compensation to be made to said Charles E. Appleby, as surviving trustee of the Ogden Land Company?

3. Does the City of Buffalo in this proceeding show a necessity for acquiring the fee of said lands?

4. Did any of the exceptions call for a reversal of the order confirming the appraisal commissioners' report?

—and the City of Buffalo, pursuant to such order, having appealed to the Court of Appeals, and said Court of Appeals having heard said appeal argued by Mr. Samuel F. Moran, of counsel for appellant, and by Mr. Edmund P. Cottle, of counsel for Charles E.
251 Appleby, as surviving trustee of the Ogden Land Company, respondent, and having ordered that the order appealed from be in all things reversed, and the order of Special Term be affirmed, with costs to the City of Buffalo in this court and in the Court of Appeals, and having certified to this court its answers to the questions so certified, as follows:

First and fourth questions certified, answered in the negative.

Second question certified, answered in the affirmative.

Third question not answered.

Now, on reading and filing the remittitur from said Court of Appeals, and

Upon motion of Louis E. Desbecker, attorney for City of Buffalo, it is

Ordered that said order of the Court of Appeals be and the same is hereby made the order of this court, and the aforesaid order entered herein in the office of the clerk of the County of Erie on the 9th day of January, 1907, be and the same hereby is in all things reversed and the order of Special Term confirming the report of commissioners appointed herein and entered in the office of the Clerk of the County

252 of Eric on the 8th day of January, 1902, be and the same hereby is in all things affirmed, with costs to the City of Buffalo in this court and in the Court of Appeals to be taxed.
[L. S.] NEWELL C. FULTON, *Clerk*.

253 UNITED STATES OF AMERICA,
State of New York,
Eric County Clerk's Office, ss:

I, John H. Price, Clerk of the County of Eric and of the Courts thereof, do hereby certify that the writings annexed to this certificate form the remittitur and are true, full and perfect copies of their respective originals, on file and remaining of record in my office.

In testimony whereof, I have caused the seal of said County and of said Courts to be hereunto affixed, at the City of Buffalo, in the said County of Eric, this 1st day of February, one thousand nine hundred and nine and of the independence of the United States the one hundred and thirty second.

[Seal Clerk's Office for the County of Eric, N. Y.]

J. H. PRICE, *Clerk*.

254 To the City of Buffalo and Louis E. Desbecker, Esq., Corporation Counsel:

Please take notice, That the annexed is a copy of an Assignment of Errors and of a petition for a writ of error on file in the office of the Clerk of Eric County.

Dated, February 9, 1909.

Yours, &c.,

O. O. COTTLE,

*Att'y for Charles E. Appleby, as Surviving Trustee
of the Ogden Land Company, Plaintiff in Error.*

255 Supreme Court of the State of New York, Fourth Judicial Department, County of Eric.

In the Matter of the Application of THE CITY OF BUFFALO to Acquire Lands under the Waters of the Buffalo River for the Purposes of a Public Highway.

CITY OF BUFFALO, Appellant,

—
CHARLES E. APPLEBY, as Surviving Trustee of the Ogden Land Company, Respondent.

To the Honorable Justices of the Supreme Court of the United States:

Comes now the above named defendant and respondent, and plaintiff in error, Charles E. Appleby, a surviving trustee of the Ogden Land Company, by his attorney, Octavius O. Cottle, and petitions this Honorable Court to allow a Writ of Error to be directed to the Supreme Court of the State of New York and to John H. Price, the

Clerk of the County of Erie, who has the custody of the record, to remove to this, the Supreme Court of the United States, for a review thereof, the record in the case lately pending in said Court below, wherein above named plaintiff in error was defendant and the defendant in error, the City of Buffalo, was plaintiff, and particularly the record of the judgment or final order rendered by said Supreme Court of the State of New York in the above entitled proceeding, pursuant to the judgment, direction and decision contained in the remittitur from the Court of Appeals of said State, which is the highest Court of said State, now on file in the office of the Clerk of Erie County, he being Clerk of said Supreme Court of said State:

256 Your petitioner alleges, upon information and belief, that said judgment or final order was entered of record in the office of the Clerk of the County of Erie on the 17th day of October, 1907, pursuant to an order of the Appellate Division of the Supreme Court of said State, in the Fourth Judicial Department, making said judgment or final order of the Court of Appeals the order of the Supreme Court of said State, and thereby reversing, with costs in the Supreme Court and the Court of Appeals amounting to \$424.94, an order of the Appellate Division of the Supreme Court of said State, which was entered in the office of the Clerk of the said County of Erie on the 9th day of January, 1907, which last mentioned order reversed an order of the Special Term of the Supreme Court of said State entered in the office of the Clerk of said County of Erie on the 8th day of January, 1902, by which the report of commissioners appointed in said proceeding was confirmed. The judgment entered on the decision of the Court of Appeals also affirmed the order of the Special Term confirming the said commissioners' report.

That said proceeding was a Condemnation Proceeding to acquire certain real estate of your petitioner and the judgment or order aforesaid, entered upon the decision and remittitur from the Court of Appeals, is a final judgment of the highest Court of the State of New York, and the record thereof has been remitted from that Court to the Supreme Court of said State and is filed in the office of the Clerk of the County of Erie, who has the custody thereof as the Clerk of the Supreme Court of said State in said County, as your petitioner is informed and believes, and therefore alleges.

257 Your petitioner alleges on information and belief that by said proceedings and said final judgment, or order, he is deprived of property without due process of law and without just compensation and has been denied the equal protection of the laws, and there was drawn in question a clause of the Constitution of the United States and the decision was against the title, right and privilege specially set up or claimed under such clause of said Constitution, to the great damage of your petitioner.

Your petitioner further alleges upon information and belief that by the said judgment of the Court of Appeals of the State of New York, your petitioner has been deprived of property exceeding five thousand dollars in value, without due process of law and has been denied the equal protection of the laws. That said judgment is

repugnant to the clause of the Constitution of the United States which declares that no State shall deprive any person of property without due process of law or deny to any person within its jurisdiction the equal protection of the laws, and there was drawn in question before said Court the validity of its authority exercised under the State of New York on the ground of said repugnancy and its decision was in favor of its validity and against your petitioner, and your petitioner was then and is now within the jurisdiction of the Supreme Court of the United States.

That the interests of your petitioner in dispute in this proceeding exceed five thousand dollars in value, exclusive of costs.

Your petitioner further alleges upon information and belief that the proceedings before the said Court of Appeals were without
258 jurisdiction and that the judgment rendered and orders made by said Court and by its direction were unauthorized and were not due process of law and were repugnant to the Constitution of the United States.

That an assignment of errors in said cause and proceedings has been filed by your petitioner in the office of the Clerk of said County of Erie, who has the custody of the record in said cause.

That said proceeding was a special proceeding to take certain real property of your petitioner by condemnation under a claim of right of eminent domain.

Wherefore, your petitioner prays for the allowance of a Writ of Error and for an order fixing the amount of bond in said cause and for such other orders and process as may cause the errors in said cause and proceedings to be corrected by the said Supreme Court of the State of New York.

Dated, New York, January 8th, 1909.

CHARLES E. APPLEBY,
Petitioner.

STATE OF NEW YORK,

City & County of New York, ss:

Charles E. Appleby, as surviving trustee of the Ogden Land Company, being duly sworn, deposes and says, that he is the petitioner described in and who subscribed the foregoing petition, and that the said petition is true to the knowledge of deponent except as to the matters therein stated to be alleged on information and belief and as to those matters he believes it to be true.

CHARLES E. APPLEBY.

Sworn to before me this 8th day of January, 1909.

GEO. B. LAUCK,
Notary Public, Kings Co., Certified N. Y. Co.

259 Writ of Error allowed and penalty bond fixed at the sum of Five Hundred Dollars (\$500.00) this 5th day of February, 1909.

(Signed)

R. W. PECKHAM,
Asso. Jus. Sup. Ct., U. S.

[Endorsed:] Supreme Court of the State of New York, 4th judicial Dept., County of Erie. In the matter of the application of The City of Buffalo to Acquire Lands under the Waters of the Buffalo River, &c. Copy. Petition for Writ of Error. O. O. Cottle, Att'y for Pl'tff in Error, 918 Ellicott Square, Buffalo, N. Y.

260 Supreme Court of the State of New York, County of Erie.

In the Matter of the Application of the City of Buffalo to Acquire Lands Under the Waters of the Buffalo River for the Purposes of a Public Highway.

Assignment of Errors.

Charles E. Appleby, as surviving trustee of the Ogden Land Company, the defendant in this proceeding, which was instituted to take private property for a public use, in connection with his petition to the Supreme Court of the United States for a Writ of Error, makes the following assignment of errors, which he avers occurred on the hearing of the cause and in the course of the proceedings and final judgment therein, viz.

First. In the above entitled proceeding, there was drawn in question the validity of an authority exercised under the State of New York on the ground of its being repugnant to the Constitution of the United States, and the decision of the Court of Appeals, the highest Court of said State, was in favor of its validity and against the said defendant, by whom such repugnancy was set up.

By the judgment of the Court of Appeals of the State of New York, which is the highest Court of said State, the said defendant has been deprived of property without due process of law and has been denied the equal protection of the laws. The said judgment

is repugnant to the clause of the Constitution of the United States which declares that no State shall deprive any person of property without due process of law or deny to any person within its jurisdiction the equal protection of the laws, and there was drawn in question before said Court the validity of its authority exercised under the State of New York on the ground of said repugnancy and its decision was in favor of its validity and against this defendant.

Second. The Common Council of the City of Buffalo adopted a resolution of which the following is a copy, viz.: "By Ald. Holmes: 'That the City of Buffalo has determined to take in fee simple for the purposes of a public highway, the lands under the Waters of the Buffalo River, between the Buffalo Creek Indian Reservation line at or near the crossing of Hamburg Street and the easterly city line and that the expense of taking the same shall be paid by the general fund.'"

Upon that resolution and a notice of motion, an order was made at a Special Term of the Supreme Court of the State of New York, held in and for the County of Erie, appointing three commissioners "to ascertain the just compensation to be made to the owners, mortgagees and persons interested for the lands to be taken."

The defendant, Charles E. Appleby as surviving trustee of the Ogden Land Company, appeared before the commissioners and made proof that the lands were worth more than \$200,000.00, the lands being about 141 acres in the City of Buffalo with a commercial environment of great value.

The counsel for the City offered in evidence before the commissioners certain maps and deeds. The defendant's counsel asked the object of the proof. The City's counsel stated that "the
262 evidence is being offered for the purpose of showing that the Ogden Land Company after it acquired the property in the Indian Reservation laid the property out in lots, and that they sold the property according to the lots which they laid out abutting on the Buffalo River, sold all the lots, and that the conveyances were to the lot lines which abutted on the river."

The resolution of the Common Council declared the intention to be to take the lands in fee simple without excepting any interest and the order appointed the commissioners "to ascertain the just compensation to be made to the owners, mortgagees and persons interested for the lands to be taken" and did not except any interest.

The defendant's counsel objected to the evidence and further objected that the commissioners have no power to determine disputed claims to the property in question; that the province of the commissioners is to determine the value of the property to be taken and not to determine conflicting interests of claimants to the property, and that the evidence is inadmissible for the purpose of establishing grounds for an award of less than the value of the premises taken.

The commissioners overruled those and other objections to their power to try the title and the defendant excepted.

Subject to the defendant's objections the commissioners received the evidence offered as above stated and other evidence relating to defendant's title, and instead of awarding the value of the property, or just compensation, awarded only six cents.

263 The commissioners had no power to try the defendant's title. Their proceedings and report were not due process of law and were repugnant to the Constitution of the United States. A proceeding by which property is taken in fee simple and compensation is made for a less interest is not "due process of law."

The defendant filed exceptions to the commissioners' report and opposed a motion made in behalf of the City to confirm it. The Supreme Court of said State, at a Special Term held in the County of Erie, overruled the exceptions and objections taken by the defendant and made an order confirming the report.

The defendant appealed from the order of confirmation to the Appellate Division of the Supreme Court, Fourth Department, and that Court reversed the order of the Special Term so appealed from and directed a new appraisal before other commissioners.

That order was not appealable. The Constitution of the State of New York (Article 6, § 9) contains the following provisions, viz.: "The jurisdiction of the Court of Appeals, except where the judgment is of death, shall be limited to the review of questions of law. Except where the judgment is of death, appeals may be taken as of

right to said Court only from judgments or orders entered upon decisions of the Appellate Division of the Supreme Court finally determining actions or special proceedings. The Appellate Division may, however, allow an appeal upon any question of law which, in its opinion, ought to be reviewed by the Court of Appeals.

The Legislature may further restrict the jurisdiction of the Court of Appeals and the right to appeal thereto."

264 Paragraph 2 of §190 of the Code of Civil Procedure of the State of New York relating to the jurisdiction of the Court of Appeals is as follows, viz.:

"Appeals may also be taken from determinations of the Appellate Division of the Supreme Court in any department where the Appellate Division allows the same, and certifies that one or more questions of law have arisen, which, in its opinion, ought to be reviewed by the Court of Appeals, in which case the appeal brings up for review the question or questions so certified, and no other; and the Court of Appeals shall certify to the Appellate Division its determination upon such questions."

Counsel for the plaintiff, the City of Buffalo, made an application to the Appellate Division, at the second term after its decision, for an order granting leave to appeal to the Court of Appeals and proposed questions to be certified for review. Defendant's counsel objected to the allowance on the ground that the application was too late and that the proposed questions are not such as the Court of Appeals has power to review, and are questions which that Court upon the evidence in the case would not be authorized to answer as matter of law against the defendant. That the defendant was entitled to a reversal on both the facts and the law and the Court of Appeals is precluded from reviewing the facts, and that there were numerous exceptions which the defendant's counsel presented to the Appellate Division as grounds for reversal, as well as other questions, which would not be presented to the Court of Appeals on a hearing of the questions proposed to be certified, and the case ought not to be heard on those questions alone.

265 The Court overruled the objections and granted the plaintiff's application and certified the following four questions for review, viz.:

"1. Is Charles E. Appleby, as surviving trustee of the Ogden Land Company, under the facts in this proceeding, entitled to an award of more than six cents damages on the City of Buffalo acquiring the fee to the lands under the waters of the Buffalo River in eminent domain proceedings, taken pursuant to its revised City Charter, for the purpose of a public highway?

2. Were the appraisal commissioners authorized and empowered, under the facts in this proceeding, to fix the actual damages of Charles E. Appleby, as surviving trustee of the Ogden Land Company, on the City of Buffalo acquiring the fee to the lands under the waters of the Buffalo River, at six cents, and to award said sum as and for the just compensation to be made to said Charles E. Appleby, as surviving trustee of the Ogden Land Company?

3. Does the City of Buffalo in this proceeding show a necessity for acquiring the fee of said lands?

4. Did any of the exceptions call for a reversal of the order confirming the appraisal commissioners' report?

The Court of Appeals misinterpreted the first two questions, yet under their interpretation the objection to the questions remains that they involve and imply conclusions and judgment by the Court upon the weight or effect of the testimony or facts adduced in the case. Whether the questions mean what appears plainly on their face, or what the Court of Appeals construed them to mean, they are such as that Court had no power to answer, and they acquired no jurisdiction by the certification of them.

Matter of Westerfield, 163 N. Y., 209.

266 The Constitution of the State of New York contains the following provision: "No person shall be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation."

Under that provision the owners of and persons interested in the property taken were entitled to "just compensation" and the Court of Appeals could not say as matter of law that six cents was "just compensation." To answer the questions it was necessary to review the testimony and facts and exercise the judgment of the Court upon its weight and effect.

The defendant's exceptions to the report alleged that the report violated both the State Constitution and the Constitution of the United States.

The first and second questions did not state the facts upon which the questions of law to be reviewed were based and the facts could not be ascertained by the Court of Appeals without a review of the evidence (which that Court said was conflicting) and an exercise of judgment as to the weight and effect of it.

The Court of Appeals had no power to review questions of fact or supply facts that were not stated in the questions, as it decided in other cases. The Court of Appeals was not authorized to review questions of fact although certified as questions for review. (Matter of Westerfield, 163 N. Y., 209.)

The third question was one the Court refused to answer.

267 The fourth question required a review of all of the evidence for a proper answer, for which the Court of Appeals lacked power. Besides, it was not a question upon which a final determination of the case against the defendant was justified. If the property was worth more than six cents, as the Appellate Division in its opinion said was "conclusively established," the defendant was entitled under the State Constitution to an award of more than six cents, and to the new appraisal which that Court had directed.

Instead of reviewing the certified questions and no other, as the Code directs, and certifying the answers to those questions to the Court below, the Court of Appeals, without authority or jurisdiction,

rendered a final judgment or order reversing the order of the Appellate Division and affirming the order of the Special Term with costs to the City of Buffalo in the Court of Appeals and Appellate Division, amounting to \$424.94.

The provision of the Constitution of the United States requiring "due process of law" is not satisfied by a final judgment based upon whatever question the Court may choose to certify for review, as it does not bring up the whole case or anything but that question.

The question certified may be a weak one and the party entitled to maintain his suit on other grounds.

An adverse answer to the third question would not justify a final judgment against the defendant. The same is true as to the other questions.

The Court of Appeals was not empowered to determine the whole case. There was nothing legally before it but the certified questions. Its authority did not extend beyond certifying its answers to the questions to the Court below.

268 See Paragraph 2, §190, Code of Civil Procedure.

The Court of Appeals exceeded its jurisdiction and its determination and judgment are repugnant to the Constitution of the United States and by it the defendant was deprived of property without "due process of law."

Objections to the jurisdiction of the Court of Appeals were duly taken by motion to dismiss the appeal and on the hearing of the cause and were decided adversely to the defendant. That appears from the record and decisions as well as the opinion.

The decision also included a decision in respect to the want of jurisdiction of the commissioners to try the defendant's title, or to try the question of navigability of the stream or the question as to whether or not it was a public highway, and to the receipt of evidence to establish grounds for an award of less than the value of the property taken (all of which was objected to by the defendant and exceptions taken to decisions overruling them) and to the award of six cents based on such trial and evidence. Neither the report of the commissioners nor the order of the court confirming it was based upon due process of law. The decision of the Court of Appeals affirming the order of the Special Term did not help the want of jurisdiction of the commissioners but brings up the question of want of jurisdiction as one that has been passed upon and decided by the highest Court of the State against the defendant.

The award based upon such trial and evidence did not cover all that the commissioners were appointed to appraise, to wit: the land in fee simple. No compensation was made for the excess and it is not due process of law to take property without compensation.
269 The property was worth more than \$200,000.00. The commissioners were led to make an award of six cents by other considerations than the value of the property.

Third. It has been decided by Courts of the State of New York that the river above Hamburg Street, which was in the Indian Reser-

vation, i. e., the part taken by this proceeding, is unnavigable. The part below has been made navigable by artificial means.

People ex rel. Lehigh Valley Ry. Co. v. City of Buffalo, 36 N. Y. Supp. 191; affirmed 86 Hun., 618; 147 N. Y., 675, 682.

The commissioners had no jurisdiction to try the question of navigability or to decide whether or not the property taken was a highway for the purpose of affecting defendant's title and diminish his award and they had no right to make an award on evidence received on those questions. They did it but it was not due process of law and the decision of the Court of Appeals confirming the report is also subject to the same objection.

Fourth. The defendant was denied the equal protection of the laws, and his property is taken without "due process of law."

a) The third certified question "Does the City of Buffalo, in this proceeding, show a necessity for acquiring the fee of said lands?" was not answered by the Court of Appeals.

b) The first two questions ask for an opinion upon the facts in this proceeding "without stating what the facts are. The Court of Appeals has repeatedly decided that it has no jurisdiction to answer such questions. The facts must be stated in the questions.

Malone v. Sts. P. & P. Ch., 172 N. Y., 269;

In re Townsend Ave., 175 N. Y., 508;

Matter of Westerfield, 169 N. Y., 209.

The questions must be questions of law only and not questions of fact or mixed questions of law and fact—"not such as involve or imply conclusions or judgment by the Court upon the weight or effect of the testimony or facts adduced in the cause."

Jewell v. Knight, 123 U. S., 426.

The Court of Appeals in groping for "the facts in this proceeding" outside of the certified questions mistook nearly every material fact in the case.

The State Constitution and the Code of Civil Procedure prohibit the review of questions of fact in plain terms.

The opinion shows that the Court misinterpreted the questions without intending to change their previous rulings.

It has been settled by many decisions of the Court of Appeals that it cannot review questions of fact where the evidence is conflicting or where different inferences may be drawn from undisputed evidence, even where the appeal is one of right on the whole case.

c) The award was not made for the entire interest or property taken, to wit: the fee simple.

d) Questions of title can only be tried by the Court.

e) The commissioners to ascertain the compensation to be made are appointed after the issues have been tried by the Court and judgment of condemnation rendered determining what shall be appraised. The Court determines what shall be appraised

before appointing commissioners and specifies it in the order appointing them.

The commissioners have no functions except that of appraisers. Their jurisdiction does not extend to a determination of the extent of the interests to be appraised.

f) The defendant was entitled to the protection of the laws which provide for trial of issues of title by the Court, and for a determination of his rights by a competent tribunal which the commissioners were not.

g) The description of the property and the interest to be taken, if not a fee simple, were too indefinite and uncertain to confer jurisdiction or to form the basis for a just award.

There was no description of the lands other than what appears in the resolution of the Common Council, hereinbefore set forth, to wit: "Lands under the waters of Buffalo River." What lands may be under water at any particular time is uncertain as the river changes its course from time to time and the volume of water varies. There was no specification of the interest to be taken other than the lands in fee simple.

Fifth. Questions 1 and 2 are not pertinent. They ask if Mr. Appleby was entitled to an award of more than six cents. The commissioners were not appointed to ascertain how much he
272 was entitled to, but to "ascertain the just compensation to be made to the owners, mortgagees and persons interested for the lands to be taken." That includes the lands and all rights and easements therein, the ownership of which the commissioners were not appointed to determine. The question of ownership was not triable before commissioners and was not properly before the Court of Appeals. Answers to those questions do not show that six cents was a sufficient award for the property in fee simple.

If the combined interests of all persons in the property were worth more than six cents a new appraisal should be ordered. When a proper award is made the right to it is open to contest by all claimants before a competent tribunal.

Unless the appraisal should cover all interests, there is not a sufficient specification of the interests to be appraised to enable the commissioners to make a just award. It was that uncertainty in the minds of the commissioners that caused an award of six cents for property worth more than \$200,000.00.

Sixth. The Court of Appeals was mistaken in respect to almost all of the material facts in the case. (See opinion, 189 N. Y. 165). It was mistaken in supposing that the part of Buffalo River above the Indian Reservation line, at or near Hamburg Street, has been made a public way by law.

The City of Buffalo was incorporated by Chapter 179 of the Laws of 1832. That act contained the provision, viz., "All those portions of big and little Buffalo Creeks within the bounds of said City be and are declared to be a public highway." The bounds of the
273 City did not then include the Buffalo Creek Indian Reservation, in which the part of what was then called Big Buffalo Creek and is now called Buffalo River was situated. The

Ogden Land Company owned the fee of the reservation subject to the possessory right of the Indians, who occupied it and did not part with their interest until several years later.

The reservation, including the part of the stream in question in this proceeding, was never owned by the City of Buffalo, the State of New York or the United States. The Ogden Land Company's title came through Massachusetts and the Indians.

The provisions of the City Charter of 1832 did not relate to the part of the creek (now called river) attempted to be taken by this proceeding. The counsel for the city offered that chapter and subsequent acts revising the charter in which were provisions similar to the above. About 1870, by an act revising the charter, the boundaries of the City were extended and in this extension the property in question was included. None of those acts provided for compensation or proceedings to take the property.

The defendant's counsel objected to those acts on the ground that the State of New York was not at the time of the passage of those laws the owner of the land in question and could not by a legislative act make it a highway without compensation to the owners. Those acts were insufficient to make the part of the river owned by this defendant a public highway for the reasons stated in *De Camp v. Dix*, 159 N. Y., 436.

The commissioners admitted those legislative acts but ruled that they agreed with the defendant's counsel that the State of New York could not take anybody's property without due compensation.

274 The Court of Appeals, however was misled by them and in the opinion say that Buffalo River has "been made a public highway by law" and failed to notice that they either did not relate to defendant's land, or if any of them did, they were invalid, and overlooked the fact that the proceedings to take the property in fee simple for the purpose of a public highway estopped the City from claiming that it was already a public highway, or from diminishing the award on that account. The question of title was not triable by the commissioners, nor was it properly before the Court of Appeals. The proceeding was to take the property in fee simple without excepting any interest and its value should be awarded. If there are conflicting claimants to the property or to any interests in it the award should be distributed by the Court in accordance with their judgment in respect to the rights of the parties after hearing the adverse claimants, in proper proceedings for that purpose. If the public had any rights in the property, the extent of them is to be determined by the Court and cannot be litigated before commissioners.

The Constitution of the State of New York contains this clause: "No private or local bill which may be passed by the Legislature, shall embrace more than one subject, and that shall be expressed in the title."

The act incorporating the City of Buffalo did not express in its title an intention to make of Buffalo River a public highway nor did any of the acts revising the charter.

It is said in the opinion: "Not only has it been made a public

275 way by law, but actually for a large part of the distance it is navigable by large boats entering from the lake and is a stream of much commercial importance."

Buffalo Creek (now called river) was not naturally navigable and so far as it is navigable now it has been made so by artificial means. There are miles of artificial ways connected with it which have been excavated by private persons through dry land which are navigated by boats as large as can navigate any part of Buffalo River.

Only a limited portion of the seven miles of river in controversy in this proceeding is navigable and that was not naturally so. It was not referred to the commissioners to determine what, if any, part of the river was navigable or a public highway.

They also say: "There does not appear to be any dispute that either by him" (Mr. Appleby) "or the company whose rights he represents substantially all of the land abutting upon the river upon either side formerly owned by the company has been conveyed away."

They also said: "This is matter of importance as bearing upon the value of the bed of the stream, because if the bed and fee to the abutting lands were owned by the same party it might well be that the possible connected use of the two would be an element of much importance in passing upon the value of the bed."

The evidence shows that the land in the river and ten to fifteen feet on each side was not laid out into lots or conveyed; that the river changed its course and for long distances left its old bed so that what was once under water had become dry land, and that in one place as much as $2\frac{3}{4}$ acres had become dry land. Assessors' maps read in evidence by the City showed the changes in the course of the river.

276 The evidence shows that the defendant owned the riparian rights which were greatly diminished in value by separating the adjacent land from the land under water.

The Court also says: "Many witnesses were sworn before the commissioners in regard to the value of this bed and the amount of the damages which should be awarded for taking it. Their evidence presented a well defined question of fact." The facts proved, about which there was no dispute, show that the property had very substantial value. The Appellate Division, which had power to review the facts as well as the law, said: "The evidence shows conclusively that such property is valuable; that it has intrinsic value cannot be doubted; that it has more than nominal value is conclusively established."

The only witnesses who placed a nominal value based their opinions upon mistaken ideas as to the rights of the owner of the land under water and on erroneous suppositions that the defendant had no riparian rights or adjoining land.

One of the City's witnesses testified: "My estimate is based upon the assumption that the ownership of the bed of the river is in different persons from that of the ownership of the abutting shores. I don't grant that the owner of the stream has any rights."

Another of the City's witnesses testified that he thought that it was legally a public highway and that the public had all the rights in a public highway, whether the public owned the fee or not and that the owner of the fee had no right to use it.

The same witness testified: "I say the adjoining property
277 owners have the right to build on their own property on the banks of the river; it gives that land greater value than some land half a mile back that has not the same privilege."

The same witness also testified that land for dockage purposes and wharves was worth \$200. or more a foot while nearby land without water frontage was worth only \$40.00 or \$50.00 a foot.

Another of the City's witnesses testified: "The riparian rights, if I had those, I think it would be worth very much more an acre," and that he knew dockage property near-by that was worth \$1000. a foot.

The only other witness for the City on the question of value testified to certain grants by the State of land under water, which he said, were going to be very valuable, and that if the same rights existed in this river, then it would have a like value.

No more effectual grants than those held by the trustee of the Ogden Land Company can be made.

It was upon the testimony of those witnesses and that of the defendant's witnesses, fixing the value above \$200,000.00, that the Court based its statement that the testimony ranged all of the way from nominal figures to one of very substantial amount. The nominal figures were based on mistakes as to the rights of the owner. They conceded that if the owner had riparian rights or could use the land that it was valuable. The undisputed facts and even the testimony of the City's witnesses, when correctly understood, show that the property has very substantial value and that the owner's adjacent property is seriously depreciated by separating it from the land under water. There were six witnesses for the defendant whose testimony showed that the property was worth more than \$200,000.00.

278 The Court also says that the commissioners were under obligations to and we must assume did view the premises to be taken.

The case states that it contains all of the evidence. If they saw anything different from what is stated in the case it should have been set forth.

What the commissioners saw on viewing the premises is not stated in the questions certified for review, and, if entitled to weight, was a fact which the court needed in order to answer the questions but did not have.

It is quite apparent from this statement that the Court could not answer the question "Is Charles E. Appleby, as surviving trustee of the Ogden Land Company, under the facts in this proceeding, entitled to an award of more than nominal damages, etc. because it was a mixed question of law and fact involving conclusions or judgment by the Court upon the weight or effect of the testimony or facts adduced in the case, and the questions omitted the facts, and

without the facts the questions of law could not be answered. The appeal should have been dismissed for want of jurisdiction.

Seventh. The Court of Appeals was not authorized to review the facts in this proceeding and upon them decide that Charles E. Appleby, as surviving trustee, was not entitled to an award of more than six cents.

There were facts conclusively established in this proceeding upon which he was entitled to an award of more than six cents under the Constitution of the State.

The defendant was the owner of the lands in question. The proceeding was to acquire the lands in fee without excepting any right or interest therein. The commercial environment of the lands was such that their value could not be otherwise than greatly in excess of six cents and it was proved that their value greatly exceeded that sum. The proceedings to acquire the lands state that they are in the City of Buffalo, which is a large City and was proved to be about the third largest port in the United States. The quantity of land as near as could be estimated from the map produced by the plaintiff before the commissioners exceeded 141 acres, and it was proved that it was adjacent to or near the largest commercial establishments in the City almost, where water frontage was in demand and very valuable. Witnesses for both parties agreed that adjoining land was worth more than \$1000. an acre, the average being about \$2000. an acre. Including his adjoining land that was not taken, defendant's land had extensive water and dockage privileges, of which he was deprived by this proceeding and dockage was worth from \$300. to \$1000. a foot, as testified to by witnesses sworn in behalf of the City. There were large quantities of sand and gravel, which were worth more than six cents, the City's engineer testifying that in that vicinity filling was worth 40 cents a yard, and it seems unnecessary to state that such quantities of sand and gravel in a large city, suitable for building purposes, are worth more than six cents. Those were facts in the proceeding.

The Appellate Division having power to review the facts said: "The evidence shows conclusively that such property is valuable; that it has intrinsic value cannot be doubted; that it has more than nominal value is conclusively established."

It was also a fact established by the evidence in the proceeding that this defendant was the owner of land adjoining the lands under the waters of Buffalo River, which were diminished in value much more than six cents by the taking of the lands under the waters of Buffalo River and depriving the owner of them of rights of dockage and other privileges. The proofs show that land with river frontage was worth several times more than land without it. Witnesses for the City so testified.

The facts above stated were conclusively established.

The Court of Appeals, contrary to the facts, erroneously answered the first question in the negative, the second question in the affirmative, the fourth question in the negative and without answering the third question, directed a judgment or final order reversing the order

of the Appellate Division, and upon such decision and direction final judgment was entered in accordance with such direction.

Six cents was not adequate compensation for the property taken and for the damage sustained by the defendant, and "under the facts in this proceeding" the first question should have been answered in the affirmative, the second in the negative and the fourth upon the exceptions and facts should have been answered in the affirmative, if the question had been answerable. The Court erred in answering them otherwise. They were not authorized to say "upon the facts in this proceeding" that as matter of law the defendant was not entitled to an award of more than six cents.

The exceptions to the commissioners' report above mentioned, the objections to its confirmation, and exceptions to rulings of the commissioners on the hearing before them, were well taken. The
281 decisions overruling these exceptions were erroneous and called for a reversal of the order of the Special Term and the answer of the Court of Appeals on the fourth question was erroneous.

The Court of Appeals was not only without jurisdiction to answer the questions but erred in its determination upon said questions, and in its decision and judgment or final order directed thereon.

The said final order or judgment made or rendered by the Court of Appeals, which is the highest Court of the State, is repugnant to the clause of the Constitution of the United States, declaring that no State shall deprive any person of property without due process of law and is against the title or right of this defendant specially set up and claimed under said clause of the said Constitution.

Eighth. The Court of Appeals acquired no jurisdiction by the allowance of an appeal to it on the questions certified.

Ninth. The questions certified did not fully or fairly present this defendant's case and it should not have been finally determined on those questions alone.

Tenth. The Court of Appeals was not authorized to finally determine the case. The whole case was not before them. An adverse answer to the fourth question alone would not authorize a reversal. The first two questions were not such as the Court had power to review, but if answered at all, should have been answered in
282 favor of the defendant. "Under the facts in this proceeding."

this defendant was entitled to an award of more than six cents under the Constitution of the State, and the decision of the Appellate Division directing a re-hearing was correct. Upon correct answers to the first two questions, the decision should have been in defendant's favor. Without answers to those questions, a negative answer to the fourth question would not justify a reversal. The Appellate Division had power to grant a new appraisal on the facts, and on the facts as they proved them, to be, the defendant was entitled to a new appraisal.

They said in their opinion that "the evidence shows conclusively that such property is valuable; that it has more than nominal value is conclusively established."

Eleventh. The order made by the Appellate Division directing the appointment of new commissioners was discretionary and not appealable.

Twelfth. The commissioners were not only without jurisdiction to try the title but did try it and based their determination in respect to it on incompetent evidence. It was not "due process of law."

Upon the hearing before the commissioners, when evidence in respect to defendant's title was offered by the plaintiff, the defendant took the objection that the proceedings were inappropriate for the purpose of trying the question of title to the property in controversy, and that evidence was inadmissible for the purpose of establishing grounds for an award of less than the value of the premises taken.

283 The commissioners overruled the objections and received evidence prejudicial to the defendant for the purpose of showing the existence of easements and defects in defendant's title, on account of which, an award might be made for less than the value of the property taken. To such ruling and evidence the defendant excepted. Subject to such rulings and exceptions, the commissioners received in evidence various deeds, which purported to convey lands in the Buffalo Creek Indian Reservation. When the deeds were offered, the defendant's counsel asked the object of the proof offered—whether any part of their proof is offered for the purpose of showing any adverse claim to the property in question or any claim to an adverse interest or easement in the property in question. The plaintiff's counsel then stated: "This evidence is being offered for the purpose of showing that the Ogden Land Company, after it acquired the title to the property in the Indian Reservation laid the property out in lots and that they sold the property according to the lots which they laid out abutting on the Buffalo River, sold all the lots which abutted upon the river."

The defendant's counsel thereupon objected to the competency and relevancy of the evidence and that the commissioners have no power to determine disputed claims to the property in question; that the province of the commissioners is to determine the value of the property proposed to be taken and not to determine conflicting interests of claimants to the property; and if this evidence is offered for the purpose of establishing any right or claim of other persons to the property in question, it raises a question that this proceeding is not a proper one to determine. The defendant also took the objection that the institution of the proceeding is based upon
284 the assumption or fact that the title to the property is not now in the City; also, that the commissioners have no power to determine disputed claims to the property or to determine claims to easements in the premises.

The defendant also took the objection that the evidence is inadmissible for the purpose of establishing grounds for an award of less than the value of the premises. The commissioners overruled the objections and received the deeds in evidence and the defendant excepted to the ruling and to the receipt of the evidence. Reference is made to the deeds set out in the case for their contents, and as a part hereof. From them the plaintiff claimed that the defendant had conveyed away interests in the property.

The plaintiff, on the hearing before the commissioners after the above mentioned rulings and subject to the exceptions thereto, of-

ferred in evidence a map. The defendant's counsel objected to the map on the ground that there is nothing to show that it was ever filed and that it is not authenticated in any way; there is no mark showing when it was filed, by whom or by whose authority; nothing showing that the trustee of the Ogden Land Company ever authorized the map or the filing of it; this is not an original map made by Lovejoy & Emslie, and not the map referred to in the evidence and there is no evidence that it is a correct copy of the Lovejoy & Emslie map; it is not the best evidence in regard to their map; the original itself is the best evidence and should be produced. There was no evidence establishing its correctness or that it was made by or for anyone interested in the property.

285 The commissioners overruled the objections and the defendant excepted.

There were lots laid out on the map with side lines extending to the river without any lot line along the river, numbered on the map the same as some lots conveyed by the above mentioned deeds, without other description in the deeds than the lot numbers, but the deeds did not refer to the map produced, and that map was not shown to be a correct copy of any map referred to in any of the deeds.

The map was then received in evidence and marked Ex. No. 4.

The rulings excepted to were erroneous and the evidence received was incompetent and prejudicial to the defendant.

A witness sworn in behalf of the plaintiff was asked: "A. Do you know, or are you able to say, Mr. Doorty, whether the land in the Buffalo Creek Indian Reservation has been sold and conveyed generally with reference to this subdivision shown by the map that was introduced in evidence?" The defendant's counsel objected to the evidence on the ground that the deeds from the trustees of the Ogden Land Company are the best evidence as to what they sold by, and sales by other people are immaterial and incompetent as against the trustees of the Ogden Land Company; they cannot be bound by sales made by other parties, unless they confine their testimony to sales made by the Ogden Land Company, or its trustees, the testimony is inadmissible; the sales of other parties are inadmissible. The defendant also objected that the map is not an original map; that there is no evidence that it is a correct copy and that it is not the best evidence. None of those maps were originals or made for the defendant, or any one from whom he derived title.

286 The commissioners overruled the objections and the defendant excepted. The exception was well taken. That map and several others were read subject to the same objections and exceptions. It was stipulated that copies of the maps may be read on the argument without being printed and they will be presented on the hearing on the Writ of Error.

William H. Slade, a witness sworn in behalf of the plaintiff, produced a map and was asked: "Q. Do you know from your knowledge or from your experience, whether this subdivision map, or one exactly like it, is accepted and regarded

as the subdivision by Emslie and Lovejoy and by Sperry of the land adjoining the Buffalo Creek Indian Reservation?"

The defendant's counsel objected to that as incompetent and that it is not the map referred to in the deeds; there is no evidence that any conveyance by any trustee of the Ogden Land Company was ever made with reference to this map and the same is not the best evidence. It is not an original map; it is not signed or authenticated by anybody, and is not shown to have been used by anybody.

The commissioners overruled the objections and the defendant excepted.

The witness answered: "I have referred to this from time to time in the prosecution of my business but whether it is correct I have no means of ascertaining."

The plaintiff then offered the map in evidence. The defendant's counsel further objected to it, even if it were something made by Peter Emslie, as a declaration, because at most it would be a declaration made after his employment as surveyor ceased.

287 The commissioners overruled the objections and the defendant excepted. Subject to the above objections and exceptions the map was received in evidence and marked Exhibit No. 5. It was stipulated that the map need not be printed but a copy of the same may be referred to by either party on the argument. The map showed some lots with side lines extending to the river without any line along the river, numbered like some lots conveyed by numbers by the deeds read in evidence.

The evidence was incompetent and prejudicial and misled the commissioners into the belief that other persons than the defendant, by purchase of lots abutting on the river, had acquired easements, and the evidence was made a basis for the mistaken statement in the opinion of the Court of Appeals that substantially all of the land abutting upon the river, upon either side, formerly owned by the Company, had been conveyed away, and for the claim made by the plaintiff that other persons than the defendant had acquired easements that diminished the value of the defendant's interest in the property, and that the award, therefore, should be less than the value of the property, the fact being that a large quantity of land on both sides of the river had not been conveyed and was still owned by this defendant, as appeared from other evidence in the case. An original map and the surveyor's minutes which were used in evidence showed that lots that appeared from Map No. 5 to extend to the river did not extend to or abut on the river and that the lines nearest to the river were some distance from it.

The rulings of the commissioners were erroneous and tended to deprive the defendant of "just compensation."

288 The proceedings to take the lands designated in the order appointing the commissioners did not except any right, title, interest or easement and the plaintiff was estopped from setting up or claiming any, and the commissioners erred in making deductions on account of supposed defects of title.

Thirteenth. It appears upon the face of the record that the award was made by the commissioners on erroneous principles.

Fourteenth. The commissioners mistook their functions and instead of ascertaining the "just compensation" to be made for the lands to the owners, mortgagees and parties in interest, as they were appointed to do, undertook to try the title and to decide that the title was not such as to entitle the owner to an award of the value of the property or more than nominal damages, and in so doing, the commissioners erred and failed to award just compensation, to which the owner was entitled, and their proceedings were not "due process of law."

Fifteenth. There was no petition and the land to be taken was not sufficiently described in the proceedings. No measurements or quantities were given and the land could not be located by the description of "lands under the waters of Buffalo River." The river was variable, changing its course from time to time and the "lands under the waters of Buffalo River" were not the same at all times. The commissioners did not have a sufficient basis for the award either by description of the land for which it was to be made or sufficient specifications of the title or interest to be appraised (if it was 289 not an unencumbered fee) from which they could determine the value of the title. The plaintiff's counsel claimed that it was so encumbered as to be without value, without defining the extent of the alleged encumbrances. For those reasons the proceedings and the judgment or final order were without jurisdiction and without "due process of law." The commissioners made their award upon an uncertain basis, fixing it at six cents without understanding what the award should be made for.

Sixteenth. The title of the defendant to property was tried on incompetent evidence and before a tribunal which was without jurisdiction. A decision was made based on such trial, by which the defendant was deprived of the property "without due process of law." The decision was adverse to the right and title set up by the defendant and was repugnant to the Constitution of the United States.

Seventeenth. The Buffalo Creek Indian Reservation, which included the lands sought to be acquired by this proceeding, was never owned by the United States, nor by the State of New York. The pre-emptive right was owned by Massachusetts, from which state, by mesne conveyances, the Ogden Land Company acquired the pre-emptive right and the Indian title by purchase from them with the approval of the United States.

The part of the river below Hamburg Street was not within the Indian Reservation and is not included in this proceeding.

290 Neither the United States nor the State Government has ever taken jurisdiction of the part of the stream which was in the Indian Reservation, nor have they expended any money thereon.

Eighteenth. The award of six cents, without anything for the defendant's costs and expenses, which exceeded that sum, took his property without compensation and imposed on him a loss besides.

Nineteenth. The defendant made a motion at Special Term to set aside the report of the commissioners upon grounds specified in the

Notice of Motion. The Special Term denied that motion. From the order of denial, the defendant appealed to the Appellate Division and the Appellate Division reversed the order of the Special Term so appealed from and directed a new appraisal. That order of the Appellate Division was not appealed from and no question relating to it was certified to the Court of Appeals and it has not been reviewed or reversed, and the order of the Court of Appeals, affirming the order of the Special Term, made without a review of that order of the Appellate Division, and the papers and proceedings upon which it was founded, was erroneous and without jurisdiction. The Court of Appeals had no power to confirm the report of the commissioners after the order confirming it had been reversed and an order made upon such reversal granting a new appraisal.

Twentieth. By the final decision of the Court of Appeals and the final judgment or decree in this proceeding entered thereon,
291 this defendant is deprived of property without due process of law and the decision is against the right and title of this defendant in said property and is repugnant to and in violation of the clause of the 14th Article of Amendments to the Constitution of the United States, which declares that no person shall be deprived of property "without due process of law" and this defendant specially sets up and claims under such clause of said Constitution the title and right to said property, of which he is deprived by said decision and the final Order or judgment entered pursuant thereto.

That said final judgment or order was entered upon the decision of the highest Court of Law of the State in which a decision in the suit could be had and is against the right and title of this defendant claimed under said clause of said Constitution.

The before mentioned errors are assigned as grounds for reversal of the decision and judgment or final order above mentioned, and said errors appear on the face of the record and immediately respect the before mentioned questions of said construction of the said Constitution, the authorities in dispute and the rights claimed by the defendant under said Constitution.

That the amount in dispute in said proceeding exceeds \$5000.00, exclusive of costs.

Wherefore, this defendant, Charles E. Appleby, as surviving trustee of The Ogden Land Company, prays that the judgment or final order aforesaid may be reversed, annulled and altogether
292 held for nought, and that he may be restored to all things which he hath lost by occasion of the said judgment or final order.

O. O. COTTLE,

Att'y for Def't & Pl'tff in Error.
918 Ellicott Square, Buffalo, N. Y.

Filed Erie County Clerk's Office Jan. 8, 1909.

STATE OF NEW YORK,
County of Erie, ss:

I, John H. Price, Clerk of the County of Erie, and also Clerk of the Supreme and County Courts for said County, the same being Courts of Record, do hereby certify that I have compared the annexed copy Assignment of Error with the original — thereof, entered and on file in the office of the Clerk of Erie County, and that the same is a correct transcript therefrom and of the whole of said original.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said County and Court, at Buffalo, this 25th day of January, 1909.

[Seal Clerk's Office for the County of Erie, N. Y.]

J. H. PRICE, *Clerk*.

No. 12829.

[Endorsed:] Supreme Court of the State of New York, County of Erie. In the Matter of the Application of The City of Buffalo to Acquire Lands under the Waters of the Buffalo River, &c. Assignment of Errors. O. O. Cottle, Att'y for Deft & Pl'tff in Error, 918 Ellicott Square, Buffalo, N. Y.

293 [Endorsed:] Supreme Court, State of New York, County of Erie. In the Matter of the Application of the City of Buffalo to take lands under the waters of Buffalo River for the purposes of a Public Highway. Copy. Assignment of Errors. Petition for Writ of Error & Notice. O. O. Cottle, attorney for Chas. E. Appleby, defendant & plaintiff in error, 918 Ellicott Square, Buffalo, N. Y. Rec'd Feb'y 5, 1909. R. W. Peckham, Asso. Jus. Sup. Ct. U. S.

294 STATE OF NEW YORK,
County of Erie, ss:

I, John H. Price, Clerk of the County of Erie and also Clerk of the Supreme and County Courts for said County, the same being Courts of Record, do hereby certify that I have compared the annexed copies of the Record, Order Denying Motion for Re-argument, Opinion of the Court of Appeals, Assignment of Errors and all proceedings, with the originals thereof, entered and filed in this office and that said copies are correct transcripts therefrom and of the whole of said originals.

In testimony whereof, I have hereunto set my hand and affixed the seal of said County and Courts, at Buffalo, this 24th day of February, 1909.

[Seal Clerk's Office for the County of Erie, N. Y.]

J. H. PRICE, *Clerk*,

By — — —, *Dep. Clerk*.

295 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of New York, Appellate Division, Fourth Judicial Department, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court upon a remittitur from the Court of Appeals of said State before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The City of Buffalo, Plaintiff and Charles E. Appleby as surviving trustee of the Ogden Land Company, Defendant, entitled Supreme Court, Erie County, "In the Matter of the Application of the City of Buffalo to Acquire Lands under the Waters of Buffalo River for the purposes of a Public Highway," in which suit a final judgment was rendered by the Court of Appeals of said State and the record thereof was remitted to the said Supreme Court and is filed with the Clerk of the County of Erie in said State who has said record as Clerk of said Supreme Court and judgment upon said remittitur is entered in said Clerk's office wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said Charles E. Appleby as surviving trustee of the Ogden Land Company as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the

United States, the 5th day of February, in the year of our Lord one thousand nine hundred and nine.

JAMES H. MCKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by
R. W. PECKHAM,
*Associate Justice of the Supreme
Court of the United States.*

297 [Endorsed:] Supreme Court of the United States. Charles E. Appleby, as surviving trustee of the Ogden Land Company, plaintiff in error, vs. The City of Buffalo, defendant in error. Writ of error. O. O. Cottle attorney for plaintiff in error, 918 Ellicott Square, Buffalo, N. Y. 24/611 & filed, Erie County Clerk's Office, Feb. 9, 1909.

298 UNITED STATES OF AMERICA,
State of New York, ss:

Erie County Clerk's Office.

I, John H. Price, Clerk of the County of Erie and also Clerk of the Supreme and County Courts for said County, the same being Courts of record, for my return to the annexed Writ of Error, which was served on me on the 9th day of February, 1909, and of which a copy has been filed in my office, have certified and annexed hereto a copy of the original Remittitur which forms the record therein referred to and which has been filed in my office and is in my custody as Clerk of the said Supreme Court, together with certified copies of other writings and papers in said proceeding and of the opinion of the Court of Appeals, Order Denying Motion for Re-argument and Assignment of Errors, on file in my office.

In testimony whereof, I have subscribed my name and caused the seal of said County and of said Courts to be hereunto affixed, at the City of Buffalo, in the said County of Erie, this 24th day of February, one thousand nine hundred and nine.

[Seal Clerk's Office for the County of Erie, N. Y.]

J. H. PRICE, *Clerk.*

299 Supreme Court of the United States.

CHARLES E. APPLEBY, as Surviving Trustee of the Ogden Land Company, Plaintiff in Error,
against
CITY OF BUFFALO, Defendant in Error.

STATE OF NEW YORK,
County of Erie, City of Buffalo, ss:

Edmund P. Cottle, being duly sworn, says that he resides in the City of Buffalo aforesaid; that he is over twenty-one years of age;

that on the 10th day of February, 1909, deponent personally served the assignment of errors, filed January 8, 1909, in Erie County Clerk's office; the writ of error, dated February 5, 1909; the bond approved February 5, 1909; the petition, verified January 8, 1909, for writ of error; with notices that said writ of error, bond and petition had been filed in said Erie County Clerk's office; and also personally served the citation, dated February 5, 1909, in the above entitled proceeding, on Hon. James N. Adam, Mayor of said City of Buffalo, and on Louis E. Desbecker, Esq., Corporation Counsel and attorney for said City of Buffalo, at their offices in the City & County Hall, in the City of Buffalo, County of Erie, State of New York, by delivering to and leaving with each of them personally, notices of filing and true copies of said assignment of errors, petition, bond, writ and citation.

That deponent of his own knowledge personally knew the persons so served to be the Mayor of and attorney for said City of Buffalo.

EDMUND P. COTTLE.

Sworn to before me this 11th day of February, 1909.

[Seal of Theodore B. Sheldon, Notary Public, Erie Co., N. Y.]

THEODORE B. SHELDON,
Notary Public, Erie County, N. Y.

[Endorsed:] Supreme Court of the United States. Charles E. Appleby, as Surviving Trustee of the Ogden Land Company, vs. City of Buffalo. Affidavit of Service.

301 UNITED STATES OF AMERICA, *ss.*

To the City of Buffalo, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the County of Erie and of the Supreme Court of the State of New York, wherein Charles E. Appleby, as surviving trustee of the Ogden Land Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Rufus W. Peckham, Associate Justice of the Supreme Court of the United States, this 5th day of February, in the year of our Lord one thousand nine hundred and nine.

R. W. PECKHAM,
*Associate Justice of the Supreme Court
of the United States.*

302 [Endorsed:] Supreme Court of the United States. Charles E. Appleby, as surviving trustee of the Ogden Land Company,

Plaintiff in Error, vs. The City of Buffalo, Defendant in Error.
Orig. Citation. O. O. Cottle, attorney for Plff in Error, 918 Elliott Square, Buffalo, N. Y.

STATE OF NEW YORK,

Erie County, City of Buffalo, ss:

On this 10th day of February, in the year of our Lord one thousand nine hundred and nine, personally appeared Edmund P. Cottle before me, the subscriber, a Notary Public in and for said County of Erie, and makes oath that he delivered a true copy of the within citation to Hon. James N. Adam, Mayor of the City of Buffalo, and to Louis E. Desbecker, Esq., Corporation Counsel and attorney for said City, on the 10th day of February, 1909, at their offices in the said City of Buffalo.

EDMUND P. COTTLE.

Sworn to and subscribed the 10 day of February, A. D. 1909

[Seal of Theodore B. Sheldon, Notary Public, Erie Co., N. Y.]

THEODORE B. SHELDON,
Notary Public, Erie County, N. Y.

STATE OF NEW YORK,

County of Erie, ss:

I, John H. Price, Clerk of the County of Erie, and also Clerk of the Supreme and County Courts for said County, the same being Courts of Record, do hereby certify that Theodore B. Sheldon, whose name is subscribed to the certificate of the proof, acknowledgment or affidavit of the annexed instrument in writing was, at the time of taking such proof, acknowledgment or affidavit, a Notary Public, in and for said County, duly commissioned and sworn and authorized to take and certify the same; and further, that I am well acquainted with the handwriting of such Notary Public and verily believe the signature to the said certificate of proof, acknowledgment or affidavit is genuine.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said County and Courts, at Buffalo, this 24th day of Feb'y 1909.

[Seal Clerk's Office for the County of Erie, N. Y.]

J. H. PRICE, *Clerk.*

No. 21511.

Endorsed on cover: File No. 21,535. New York Supreme Court. Term No. 162. Charles E. Appleby, as surviving Trustee of The Ogden Land Company, plaintiff in error, vs. The City of Buffalo. Filed March 1st, 1909. File No. 21,535.

SUPREMACY

CHARLES F. ...
of the ...

UNIT OF ...

... ..

BREATH ...

O. O. ...

EDWARD P. ...
Edward

SUPREME COURT OF THE UNITED STATES

CHARLES E. APPLEBY, as Surviving Trustee of the
Ogden Land Company,
Plaintiff in Error,
against
CITY OF BUFFALO.

BRIEF AND ARGUMENT FOR THE PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

This is an Eminent Domain Proceeding prosecuted in the Supreme Court of the State of New York, by the City of Buffalo, to acquire title in fee simple to "the Lands under the waters of the Buffalo River between the Buffalo Creek Indian Reservation line, at or near the crossing of Hamburg street, and the easterly City Line, for the purposes of a public highway." That was the only description of the land.

Charles E. Appleby, as surviving Trustee of the Ogden Land Company, was the owner and defendant. (Record, page 37). There was no petition.

Three Commissioners were appointed at a Special Term of the Supreme Court, on application made by direction of the Common Council of the City to ascertain the just compensation to be made to the owners, mortgagees and persons interested, for the lands. The defendant appeared before them and produced witnesses who testified to facts showing that the land was worth more than \$250,000 and that his adjacent property was diminished in value by severance from the property taken. They testified that there was a demand for such property and to recent sales. The City produced witnesses who testified that in

their opinions the property was worth little or nothing, but on cross examination, it appeared that their opinions were based on the assumption that the defendant had no adjacent land and that he had no more rights in the property than any other citizen. They testified that the riparian rights, if he had them, were very valuable and that dockage (wharves) were worth \$200 to \$1000 a foot front, that the right to build and maintain docks was of great value, and that the value of all adjacent property ran into the thousands. There were at least 141 acres of land, much of which was available for wharves. The City's engineer and witness testified to cost of dredging and docking, showing on the evidence of value of such property that as thus improved it would be worth more than half a million of dollars over the cost of improvement. The commercial environment was proved, showing that it was in the vicinity of the largest commercial interests in the City almost, where land, and especially property with water communications had great value, and that there was a demand for such property.

When certain deeds and maps were offered in evidence by counsel for the City, the defendant's counsel objected to each of them on the ground that the proceedings were inappropriate for the purpose of *trying the title*; that the commissioners had no power to determine disputed claims to the property; that the evidence was inadmissible for the purpose of establishing grounds for an award of less than the value of the property taken; that the maps were unauthenticated and were incompetent as evidence against the defendant. The commissioners overruled the objections and the defendant excepted to the ruling on each of the objections. Subject to the objections and exceptions, the commissioners received evidence upon which the City's counsel claimed that the defendant's title was encumbered; that he had no adjacent land and that he was not entitled to the full value of the property taken. The evidence admitted and other objections and exceptions are stated in the Assignment of Errors. (Pages 148 to 151; and objections and testimony, pages 91 to 102 of Record).

The commissioners made a report awarding the defendant as trustee six cents as compensation and filed the report in the office of the Clerk of the County of Erie with the testimony taken. (Page 31). No award was made

to anyone else except six cents to him individually in which capacity he made no claim.

To such report the defendant duly filed and served written exceptions upon the grounds among others that the sum awarded was not just compensation for the property taken; that the report was contrary to and in violation of the Constitution of the United States, which provides that private property shall not be taken for public use without just compensation; that the owner of the fee of the land was entitled to substantial damages and the sum reported is only nominal and much less than the damage sustained by the owner by the taking of the property and was contrary to law, the facts and the evidence. (Record, pages 17, 35).

Counsel for the City applied to the Special Term of the Supreme Court in Erie County for an order confirming the report, the defendant's counsel opposed the motion on the report, the evidence and exceptions taken before the commissioners, the written exceptions to the report and other grounds. (Record, page 36). The Special Term made an order confirming the report. The defendant's counsel made a motion to set aside the order and report. The Court denied the motion but modified the order.

The defendant appealed to the Appellate Division of the Supreme Court, Fourth Judicial Department, from the order of confirmation and from the order denying the motion to set it aside and stated in his notice of appeal what additional orders he would seek to review as provided in Code C. Pro. 3375, 3377. (Record, pages 1 and 2).

The Appellate Division *reversed* the order of confirmation and the order denying the motion to set it aside and directed a re-hearing before new commissioners to be appointed by the Special Term. (Record, page 120). The order of the Appellate Division was not an order finally determining the proceeding and was not appealable. The City's counsel applied to the Appellate Division under subdivision 2 of Section 190 of the Code of Civil Procedure for allowance of an appeal and a certificate that one or more questions of law had arisen which in its opinion ought to be reviewed by the Court of Appeals. The defendant's counsel opposed the application upon the grounds among others that the application was too late and objected to the questions proposed to be certified and their *form*,

which included objections that the questions were not such as the Court of Appeals had power to review and that they did not cover all the grounds upon which the defendant was entitled to the order of reversal. (Record, page 123). The Court granted the application and certified four questions.

"1. Is Charles E. Appleby, as surviving trustee of the Ogden Land Company, *under the facts* in this proceeding entitled to an award of more than six cents damages on the City of Buffalo acquiring the fee to the lands under the waters of Buffalo River in eminent domain proceedings taken pursuant to its revised City Charter, for the purpose of a public highway?"

"2. Were the appraisal commissioners authorized and empowered, *under the facts* in this proceeding, to fix the actual damages of Charles E. Appleby, as surviving trustee of the Ogden Land Company on the City of Buffalo acquiring the fee to the lands under the waters of the Buffalo River at six cents, and to award said sum as and for the just compensation to be made to Charles E. Appleby, as surviving trustee of the Ogden Land Company?"

"3. Does the City of Buffalo in this proceeding show a necessity for acquiring the fee of said lands?"

"4. Did any of the exceptions call for a reversal of the order confirming the appraisal commissioners' report?" (Record, pages 123-4).

There were no facts certified or statements of facts in the questions, nor any findings of fact. By the State Constitution the jurisdiction of the Court of Appeals is limited to the review of questions of law. It was not authorized to review the evidence and determine questions of fact from it. Art. 6. Section 9 N. Y. Constitution.

The City's counsel served a copy of the order containing the questions and a notice of appeal to the Court of Appeals from the order of reversal. The defendant's counsel made a motion to dismiss the appeal for want of jurisdiction. The motion was held to be considered with the appeal. The motion and appeal were argued together by direction of the Court but the Court overlooked the motion and did not decide the motion until a further motion had been made and until some time after its decision of the appeal. (189 N. Y. 163, 537). The Court of Appeals determined three of the questions against the defendant,

answering "No" to the first question; "Yes" to the second; "No" to the fourth and did not decide the third.

Subd. 2 of Section 190 of the Code of Civil Procedure provides that when the Appellate Division allows an appeal and "certifies that one or more questions of law have arisen which, in its opinion, ought to be reviewed by the Court of Appeals * * the appeal brings up for review the questions or question so certified, *and no other*; and the Court of Appeals shall certify to the Appellate Division its determination upon *such* questions." There is no provision for determination of the *whole* case or for judgment, or for determination of any questions except the questions of law certified for review.

Instead of certifying to the Appellate Division its determination upon the questions, the Court of Appeals rendered *final* judgment reversing the order of reversal made by the Appellate Division and affirming the order of the Special Term, with costs of the Court of Appeals and Appellate Division. The judgment was remitted to the Appellate Division to be enforced and was entered in the office of the Clerk of the County of Erie, who was the officer entitled by law to the custody of the record.

The defendant served and filed an Assignment of Errors, specifying among other things that the defendant's exceptions to the report alleged that the report violated both the State Constitution and the Constitution of the United States (139, 147) and that the final order or judgment made or rendered by the Court of Appeals, which is the highest Court of the State, is repugnant to the clause of the Constitution of the United States declaring that no state shall deprive any person of property without due process of law and is against the title or right of this defendant specially set up and claimed under said clause of the said Constitution (Page 147) and that by said final judgment or decree, this defendant is deprived of property without due process of law. (Page 152). *The errors are more particularly stated in the Assignment of Errors in the record (Pages 136 to 152), and in succeeding statements and points herein.*

The defendant applied to an Associate Justice of the Supreme Court of the United States, Mr. Justice Peckham, for allowance of a Writ of Error. It was duly allowed and served and a return to it has been made, upon which the cause is now before this Court.

Specification of Errors.

The number of each specification corresponds with that of a point in the brief.

1. The State of New York, by the judgment of its highest Court, in this proceeding, has deprived the Plaintiff in Error of property without due process of law, contrary to and in violation of the prohibition contained in Section 1 of the 14th Amendment to the Constitution of the United States.

This proceeding, prosecuted under authority of the State of New York, takes private property worth more than \$200,000 owned by the Plaintiff in Error. The authorities proceeding to make the appropriation did not keep within the authority conferred, or observe regulations made for his protection.

The award of six cents made by the commissioners and confirmed by the Court of Appeals, by its judgment affirming the order of the Special Term confirming the commissioners' report, was not due compensation or due process of law and is repugnant to the provision of the first section of the 14th Amendment to the Constitution of the United States forbidding any State to take property of any person without due process of law, duly set up by the plaintiff in error.

2. This proceeding was a suit; the judgment of the Court of Appeals was a final judgment of the highest Court of the State. It may be reviewed on Writ of Error and the Supreme Court of the United States may examine and decide for themselves whether the Constitution has been violated and is not concluded by rulings of state courts.

3. Material requisites of due process of law were lacking in this proceeding. The property owner was not given an opportunity to be heard in the Court of Appeals on all of the grounds upon which the decision of the Appellate Division was rendered in his favor; due compensation was not made or secured; and the officers proceeding to make the appropriation did not keep within the authority conferred or observe the regulations made for the protection of the property owner.

4. The order of the Appellate Division granting a rehearing before new commissioners was not an order finally determining the proceeding and was not appealable as of

right. It could not be made appealable by allowance of appeal and certifying questions, nor could such questions as those certified be reviewed by the Court of Appeals.

5. There was no authority for certifying any questions but questions of law. They cannot include questions of fact and must be distinct propositions of law clearly stated.

The questions certified did not come within the rule and were insufficient to confer jurisdiction. The rules governing the questions that may be certified under the Code are the same as those under the United States Judiciary Act permitting certificates of questions to the Supreme Court by the Circuit Court of Appeals on division of opinion.

6. The first two questions ask for an opinion "under the facts of this proceeding," and were not answerable because the facts were not certified, and the Court of Appeals did not have jurisdiction to decide what the facts were upon evidence in the record.

Upon the presumption that the Appellate Division decided the facts warranted by the evidence in favor of the party prevailing before it, the question was in substance—"Is Charles E. Appleby, as surviving trustee, etc., under the facts of this proceeding entitled to an award of more than six cents, etc., he being the owner and the property being worth more than a quarter of a million of dollars?" The answer given was erroneous under the facts.

The third question was not answered, the Court holding that it was immaterial, though it should have been answered in favor of the property owner.

The fourth question was not a distinct proposition of law and the attempted answer was erroneous. It is considered under Point XXX of the Brief.

7. The certification of questions did not bring the proceedings before the Court of Appeals. The effect on the whole case is like that of the certification of questions by the Circuit Court of Appeals to the Supreme Court of the United States, and does not give jurisdiction to determine the whole case.

8. The land owner was not given an opportunity to be heard in the Court of Appeals on all of the case. An opportunity to be heard on weak, irrelevant or immaterial questions, or such as the Court had no power to review, excluding grounds upon which he was entitled to and did prevail in the Appellate Division, was not the due process of law he was entitled to under the Federal Constitution.

If the whole case had come before the Court of Appeals, it must have been dismissed because it included questions of fact and matters of discretion which the Court of Appeals could not review. It could not do on part of the case what it could not do on the whole. Its jurisdiction could not be enlarged by certifying questions not otherwise reviewable.

9. Were the Court of Appeals authorized by statute to render judgment on the whole case without having the whole before it, the statute would be unconstitutional. The judgment rendered without such authority is unconstitutional.

10. It was incumbent on the appellant in the Court of Appeals to show affirmatively that some error was committed at the Appellate Division, which the Court of Appeals could correct. It did not do so.

11. The order of the Appellate Division is presumed to have been made and was made on the facts and in its discretion, as well as upon questions of law, including the Constitutional provision, and was not reviewable.

12. If the order of the Appellate Division might have been made on questions of fact or in the discretion of the Court, it was not reviewable. Points XII, XXIII & XLII.

That is the general rule and there is no exception to it applicable to this case.

13. There was not due process of law in this proceeding. Departures from due process of law are pointed out in specifications of error referred to in Point XIII of the brief.

14. Charles E. Appleby, as trustee of the Ogden Land Company, was entitled to an award of more than six cents and the commissioners were not authorized to fix his actual damages at that sum.

15. Upon the evidence, referred to in Point XV of this brief, a reasonable mind could come to but the one conclusion—that the property was of great value. That established the fact as matter of law, and the award should have been substantial.

16. The proceedings of the commissioners in trying the title of the Plaintiff in Error to the property in question and in receiving evidence to establish grounds for an award of less than the value of the property taken were not due process of law. The commissioners exceeded their jurisdiction.

17. Evidence admitted by the commissioners and their rulings on the hearing before them tended to subvert the right of the owner to that just compensation to which he was entitled and the exceptions thereto and to the report on the ground of insufficiency of the award and its repugnancy to the Constitution of the United States called for a reversal of the order confirming the commissioners' report.

18. Evidence objected to on the ground of incompetency was improperly received by the commissioners to affect the owner's title and the exceptions thereto were well taken. The owner was prejudiced by the incompetent evidence.

19. The award was made on erroneous principles.

20. The jurisdiction of the Court of Appeals is defined in Sections 190 and 191 of the Code of Civil Procedure, copied in Points IV and XX. Under those sections, an appeal from the order of the Appellate Division could not be taken as of right; if questions of law could be certified for review, the jurisdiction was limited to a determination of the question; final judgment on the whole case was not authorized; the questions certified were not such as the Court had jurisdiction to review; there was nothing brought up that it had power to determine, and the appeal should have been dismissed.

21. The jurisdiction of the Court of Appeals cannot be enlarged in respect to the questions it may review by allowance of an appeal and certifying questions. The order of reversal by the Appellate Division was discretionary and not appealable.

22. The Appellate Division had discretionary power to grant a new appraisal and the exercise of its discretion was not subject to review by the Court of Appeals.

23. The commissioners' report was not effective without confirmation by the Supreme Court. That Court has power to review the proceedings and to direct a new appraisal when for any reason it seems just to do so. Its order granting a new appraisal was not reviewable by the Court of Appeals.

24. The Court of Appeals is an appellate Court and has only such jurisdiction as the statute confers. The statute did not confer jurisdiction to determine the questions certified. Its judgment was rendered without jurisdiction and for that reason should be reversed.

25. An appeal upon the whole case could not be taken; the whole case could not be sent up to the Court of Appeals on certified questions and it did not have authority to decide the whole case and render final judgment.

26. If this could have been a general appeal and there were controverted questions of fact, it must have been dismissed because the Court could not review such questions. The whole includes all of its parts and what could not be done on the whole case could not be done on part of it.

27. The Court of Appeals in various cases have held that it cannot review such questions as the first two and that where questions certified cannot be decided without deciding questions not certified, the appeal should be dismissed. The decision in this case conflicts with their decision in other cases.

28. The Court of Appeals have decided that the rules governing questions that may be certified for review to it are the same as those relating to questions certified by the United States Circuit Court of Appeals. It has been decided by the Supreme Court of the United States and the Court of Appeals that such questions as those certified are insufficient and should be dismissed. That is regarded as the settled law by the Supreme Court of the United States and should be by the State Court.

29. The first two questions are mixed questions of law and fact, without the facts, and neither of them is such as the Court of Appeals had power to review.

30. The fourth question "Did any of the exceptions call for a reversal of the order confirming the appraisal commissioners' report?" does not present a distinct point or proposition of law, clearly stated, so that it could be answered without regard to the other issues of law in the case and was insufficient. There was no answer given to it disclosing any distinct proposition of law decided. The answer given to it was erroneous both on the facts and the law.

31. The proceedings take the property in fee simple; the City becomes absolute owner with power to sell or dispose of it as it sees fit. In no contingency does it revert to the person from whom it is taken and the amount to which the owner was entitled is not affected by the purpose for which it was said to be taken. No deduction could be made for supposed benefits. Section 3370 of the Code prohibits any

allowance or deduction on account of any real or supposed benefits which the owner may derive from the public use for which the property is to be taken.

32. The owner did not have his day in Court. For that reason, the judgment by which he was deprived of property was not due process of law and was repugnant to the Federal Constitution.

33. The Court of Appeals did not have jurisdiction to reverse the order of the Appellate Division, or to render a final judgment. For that reason, it should be reversed. It was not due process of law.

34. The Court of Appeals erred in deciding that the order of the Appellate Division should be reversed on the ground that the evidence respecting value was conflicting. Reason and authority required dismissal of the certificate and appeal instead of reversal of the order of the Appellate Division.

35. The questions were misinterpreted by the Court of Appeals and they erred in not granting the motion for resettlement to make them express clearly the meaning intended. Even as interpreted, the questions were not such as the Court had power to review.

36. The Court of Appeals doubted the correctness of their interpretation of the first two questions and erred in deciding that they might reverse on the fourth question alone.

37. There was no proposition of law distinctly stated in either of the questions attempted to be decided and the third question was held to be immaterial and was not decided. The Court of Appeals erred in reversing the order of the Appellate Division on such questions.

38. There was no proposition of law distinctly stated. The Court of Appeals did not discover at "first sight" what they finally concluded was meant by the first two questions, and then placed on them a construction different from what was understood by the counsel and court below. The Court of Appeals did not return an answer to the questions from which any proposition of law could be discovered and their answer did not justify a reversal of the order of the Appellate Division.

39. The Court of Appeals was not justified in interpreting the questions, as their opinion shows they did, nor in reversing the order of the Appellate Division on such an interpretation, if correct.

The Appellate Division in their questions said "facts" and they meant facts and not evidence, but the questions were defective in not stating the facts.

The cause should have been remitted to the Court below for a statement of the facts, as determined upon the evidence, or the certificate should have been dismissed as insufficient.

40. The Court of Appeals can only answer the questions and they must be questions of law. It has no further jurisdiction. An answer to the questions, such as the opinion gives, does not show that the order of the Appellate Division ought to be reversed.

41. The specifications of error in the Record cover the question of insufficiency of the certified questions and want of jurisdiction to answer them and other errors.

42. The reasons given by the Court of Appeals for their interpretation of the questions are not sound. Among the reasons they state, is, "that the reversal by the Appellate Division must be deemed to be made as matter of law." The great weight of authority is the other way. The learned judge inadvertently cites Sec. 1361, which relates only to appeals to the Appellate Division, and Sec. 1338, which relates only to reversals of judgments in actions entered on reports of referees and decisions of judges after trials of issues of fact, where the report or decision must contain findings of fact and conclusions of law and direct the judgment to be entered, and the facts found must be sufficient to support the conclusions of law or the judgment will be reversed. (*Dougherty v. Lion Fire Ins. Co.*, 183 N. Y. 302). Report of evidence in such cases does not comply with the requirement that the facts must be found and stated in the decision (183 N. Y., 302 *Supra.*) The learned judge failed to notice that Sec. 1338 is not applicable to a case like this, and that the general rule is settled the other way by numerous cases. The great weight of authority is against the presumption stated in the opinion. (Points XII and XLII of this brief).

Sec. 1338 creates an exception not applicable to a case like this, which is not an action, and no issues have been tried and there has been no report of a referee or decision of a judge containing findings of fact and conclusions of law and directing the judgment to be entered. It does not apply to a case like this where no issues have been tried

and the order simply directs a re-assessment of damages.

The cases cited by the learned judge are not in point and are not authorities for applying to a case like this the exception to the general rule.

The error of the Court was fundamental and probably resulted in a decision it otherwise would not have rendered.

43. The Court was not justified in selecting Sec. 1338, relating to appeals in actions and applying it to special proceedings, without applying the other provisions which would have required a dismissal of the appeal.

44. The Court of Appeals attempted to exercise its judgment upon the testimony and was mistaken in respect to almost every material fact in the case.

They were mistaken in supposing that substantially all of the land formerly owned by the Company has been conveyed away, and in respect to the effect upon the value of the land under water caused by the supposed conveyance.

There was no certificate of any question relating to or stating the amount of land owned by the trustee of the Ogden Land Company adjacent to the stream, or the effect on it of severance from the land under water, without which the Court could not decide the first two questions.

45. The descriptions of the lots in the field notes, giving bounds and courses and distances and descriptions of the surface and soil, and the original map, and the descriptions in the deeds, are such that the owner did not convey interests in the river but had left an amount of upland which preserved the riparian rights. That was a fact which should have been stated in the questions to make them answerable, with a statement of the value of the riparian rights.

46. It was proved that there was a market for the land under water at very substantial prices. The Appellate Division, which had jurisdiction to decide the facts on the evidence, said that it was conclusively proved.

The owner was entitled to the value for the most advantageous use to which it was adapted.

47. The Court of Appeals erred in supposing that the evidence of the witnesses ranged all of the way from nominal figures to one of very substantial amount. There was no evidence that the value of the property in fee simple was nominal. Opinions that a title, which the witnesses

supposed did not give the owner any more right to use the property than any other citizens possessed, had only nominal value, and opinions based upon the supposition that the owner had no adjacent land, were not opinions in respect to the value of the property, and were not entitled to weight as evidence in respect to the value of the property, in fee simple. All of the witnesses agreed that the riparian rights were valuable and that the fee simple, which includes the right to use for all lawful purposes had great value.

48. The view by the commissioners of the premises was not evidence. It was for the purpose of enabling them to better understand the testimony. The case states that it contains all of the evidence and it must be so regarded. There was no statement in the report of anything seen by them or that any facts testified to by the witnesses were incorrect.

Since the commissioners are required to take all legal testimony offered and to report it with their proceedings to the Court, and their report has no validity until confirmed by the Court, which reviews it on the testimony taken and the facts stated in the report, the report must be supported by the evidence or it cannot stand. The final conclusion must rest on the evidence. The Supreme Court was not precluded from setting aside the report on account of the provision of law authorizing the commissioners to view the premises. The Appellate Division has discretionary power to grant a new appraisal. (Points XXII, XXIII and cases cited under Point XII of the brief and Sec. 3377 of the Code copied in Point LI).

49. The opinion states that "the river has been made a public highway by law."

That is not stated as a fact in the questions and the Court was mistaken in respect to the fact. It could not be made a highway by law without provision for compensation or process of law and there has been none except this proceeding.

The provisions of the Buffalo Charter, declaring Buffalo Creek in the City of Buffalo a navigable stream, were objected to but were received and prejudiced the land owner.

The provisions in the charter passed in 1832 related only to the part of the river in the City of Buffalo. The part of the river in question in this proceeding was not

then in the City of Buffalo. It was in the Buffalo Creek Indian Reservation and was not owned by the City or State of New York and could not be made a highway by legislative enactment without compensation or process of law. The State of New York never owned it. The trustee of the Ogden Land Company derived title under a grant from the Crown of Great Britain to the Colony of Massachusetts Bay, granting lands between specified boundaries, including rivers and waters within those boundaries, and by treaty with and deed from the Seneca Nation of Indians, whose reservation it was. There has never been a legislative enactment to make the part of the river which was in the Indian Reservation a highway that contained any provision for compensation or process of law, without which it would be unconstitutional and void.

50. Buffalo River, formerly called Buffalo Creek, was not naturally a navigable stream, and so far as it is now navigable, has been made so by artificial means, by excavation, dredging, removal of bars, barriers of rocks, and other obstructions to navigation. At its mouth, it was much of the time a mere rivulet, which could be stepped across. The United States has never asserted jurisdiction and the State of New York has never expended any money on it.

51. The Appellate Division was authorized to grant a new appraisal in its discretion.

52. The Court of Appeals erred in deciding that the fourth question must be answered in the negative.

53. The Court of Appeals erred in not determining the third question and in deciding that it was immaterial. It was material under provisions of the Code (Sec. 3360).

54. The first two questions are irrelevant and incompetent because they involve an inquiry in respect to the title, while the award should have been for the property in fee simple irrespective of ownership. The City's counsel confused the commissioners in respect to what they were to appraise and induced them to understand that they were only to appraise the rights of Mr. Appleby, which he said were intangible. They were misled as to what they were to appraise and in the absence of anything definite in respect to his rights awarded a nominal sum instead of the value of the property in fee simple.

55. The judgment rendered by the Court of Appeals was not due process but only "mere form of law", without jurisdiction and contrary to the 14th Amendment of the Constitution of the United States.

The Circuit Court of Appeals cannot send up the whole case to the Supreme Court in the form of questions. The order of the Appellate Division was not appealable and the whole case could not be sent up by certifying questions. It is more objectionable to render judgment on the whole case upon questions which cover only a part of it, and were not reviewable. The questions did not call for a determination of anything but the questions.

56. This case was not within the spirit or intent of subd. 2 of Sec. 190 of the Code, and it was error to certify that questions of law had arisen which ought to be reviewed by the Court of Appeals, or that those certified were such.

57. The rights of the owner of the fee of the land were valuable, as the facts proved in respect to it by uncontradicted evidence conclusively showed. (Statements of Facts under head of Commercial Environment and Cost to Improve and Evidence referred to in the Statement of Facts).

It is not necessary to be an expert to know that property such as this was proved to be, with proof of demand for such property for purposes for which it was adapted, was valuable. Marketability was a question of fact, not of opinion. The owner was entitled to substantial damages. The award of nominal damages was erroneous and properly vacated by the Appellate Division. The rights which the owner had, as determined by many cases and as stated in Point LV of this brief, had large value whether the stream was a highway or not.

58. The owner was entitled to substantial damages for depreciation of his adjoining land. Land in that locality, with the right to build wharves and docks, was worth from \$200 to \$1000 a foot front while near-by land, without those rights, was worth not more than \$40 to \$60 a foot. The first 1300 feet, if dredged and docked, would be worth more than \$400,000, over the cost of improvement according to the testimony of witnesses for the City. The right to use the property for such purposes is settled by authority. (Point LVII).

59. The proceedings either take the property in fee simple or they do not. If in fee simple, the award should have been made for the property, without deduction for any interest, public or private.

If not taken in fee simple, the interest taken or excepted was not sufficiently defined to be the subject of appraisal. In either case the order of the Special Term was erroneous and was properly reversed.

60. The description was insufficient to confer jurisdiction. That is a question going to the validity of the proceeding, which may be raised at any time either by direct or collateral attack. It was raised in opposition to the confirmation of the report by the Special Term.

61. These proceedings were instituted to acquire what the City did not own and they could not be permitted to dispute the title (Point XVI). The case states that Charles E. Appleby, as surviving trustee of the Ogden Land Company, is the owner. If the property was owned by the State of New York, or the United States, the proceedings could not be maintained.

62. The 14th Amendment to the Constitution of the United States was violated by the judgment of the Court of Appeals and the previous proceedings.

63. Authorities and arguments on questions of title are irrelevant here. The title could not be tried before commissioners of appraisal. (Point XVI).

64. The judgment of the Court of Appeals affirming the order of the Special Term deprived the plaintiff in error of property without due process of law and was repugnant to the 14th Amendment to the Constitution of the United States and is reviewable and reversible on Writ of Error.

65. The order of the Special Term denying the motion to set aside the report and order confirming it for irregularity was reversed on appeal and a re-hearing granted before new commissioners. No questions respecting that order were certified to the Court of Appeals. With that order in force, the Court of Appeals should not have made an order affirming the order of the Special Term.

66. The Constitution makes the Federal Constitution supreme. All state laws and decisions conflicting with the laws of the Nation must be disregarded.

This specification of Errors is followed by a statement of facts and of evidence, and the Points or brief of the

argument exhibiting a statement of the points of law and fact to be discussed, with a reference to the pages of the record and the authorities relied upon in support of each point.

Following the brief of the argument is a reply to points which from the City's brief in the Court of Appeals we suppose will be urged here.

FACTS.

(References herein are to pages of the Record unless otherwise stated).

The Common Council of the City of Buffalo passed a resolution of intention to take, followed by a resolution that it had determined to take *in fee simple*, for the purposes of a public highway, "*the lands under the waters of the Buffalo River between the Buffalo Creek Indian Reservation line at or near the crossing of Hamburg Street and the easterly City Line.*" (Pages 4, 5).

There was no other description of the property or statement of the interest to be taken.

In behalf of the City a notice was served on Charles E. Appleby, surviving trustee of the Ogden Land Company, of the determination to take in fee simple and appropriate said lands for the purposes of a public highway, and that at a Special Term of the Supreme Court to be held in and for the County of Erie, N. Y., on the 3rd day of June, 1901, the Corporation Counsel of the City of Buffalo, would apply to said Court for the appointment of three commissioners to ascertain the just compensation to be made for such lands to the owners or mortgagees or parties in interest. (Pages 6 and 7).

Pursuant to said notice, the Corporation Counsel applied to the Court and obtained an order appointing three commissioners to ascertain the just compensation to be made to the owners, mortgagees and persons interested, for the lands to be taken as described in the notices given in behalf of the City, (Pages 9 and 10).

Owner's evidence as to value of property taken.

The plaintiff in error (hereinafter mentioned as owner) appeared before the commissioners by his attorney, and

witnesses were sworn and gave testimony in his behalf. Six of them were real estate dealers in the City of Buffalo whose testimony as to value of the land under water within the terminals specified was to the effect that it was from \$4000.00 an acre at the lower end to \$1000.00 to \$1200.00 an acre at the upper end, and averaged about \$2000.00 per acre. (Pages 39-54). As near as could be estimated by a computation based on scaling a map produced by the City Engineer, which he testified was drawn upon a scale of 300 feet to an inch, there were over 141 acres of land and more than seven miles in length of river, (Pages 41-2). Witnesses for the owner testified that there was demand for such property and that adjoining land is more valuable with than without it. That the land under water is more valuable than adjoining or near-by land without riparian rights.

William H. Slade, one of the witnesses for the land owner, testified: "I have owned land adjoining the waters of Niagara River with the right to acquire the fee of the land under water, and by so owning and dealing and selling, acquired a knowledge of the value of land under water in the City of Buffalo and adjoining Lake Erie and any navigable streams—Buffalo River—Niagara River—has a market value from my knowledge of such things and of the sales that have been made, and my knowledge of the additional value it gives to adjoining land; I have a knowledge and opinion of the value of the lands under water of Buffalo River between the Indian Reservation line and the City line. I owned this lot No. 186 shown on the map; in my opinion the value of the fee of the bed of Buffalo River from the Indian Reservation Line to the City Line is \$2000.00 an acre on the average; the lands next towards the mouth of the river are worth more than further up, but I think the average would be \$2000.00 an acre." (Page 42).

On cross-examination he testified: (Pages 42-3). "In those cases where land has been acquired under the waters of Lake Erie and Niagara River, in my notion the purchaser attached more value to the land under water than the dry land had; the owners of the uplands in those cases got the land under water; the law of those grants forbids them going to any other than the upland owners." (That is where the State owned the lands under water and the purchase is from the State).

On re-direct examination he testified: (Pages 43-4). "The upland owners had to buy the land under water and pay for it and in addition to paying the State, they paid a higher value to the owner of the upland than they would simply for land that was not adjoining land under water, and where they might not have acquired the title to the land under water. Take Buffalo River seven miles in length running through mostly a business section, the privileges pertaining to the fee of the land, added to the adjoining land, are worth something, and I have expressed my opinion as to that, so that taking all these things into consideration my opinion as to its value remains at \$2000.00 an acre. I have land fronting on Niagara River and have reason to know something about the values of land under water by reason of that as-well as having owned land along the lake shore; I know how much it enhances adjoining land and what that land will sell for to owners of adjoining land. Near Buffalo River has been excavated extensive ship canals—the Blackwell Canal and the Lehigh Valley Railroad's canal—the plan has not been fully carried out yet, they have carried it out in part. The Blackwell Canal and the Lehigh Valley Canal cover a large frontage and were made at a very large expense for the purpose of dockage and commercial purposes upon their banks; they have expended large sums of money to get these navigable channels adjoining their lands; there are plans for extensive additional facilities of that kind that have been proclaimed and I think are expected to be carried out with the growth of commerce; the whole water front is owned by three or four from the toll gate crossing down to Stony Point; I think there are five individuals that own the front; a good deal of it has changed hands within five years; I was the owner of a considerable portion along that shore and had reason to know the effect upon the market value of adjoining land of the privilege of acquiring the fee to land under water; I found that riparian rights were worth more than the uplands."

Van Horn Ely, a witness for the land owner, testified to his knowledge of the value of such property and that there is a demand for waterways—ship canals in the City of Buffalo in the vicinity of the property in question, that there have been sales of land and the owner then excavat-

ed ship canals for the purpose of making waterways, and that such demand still continues; this is a growing section of the City; increase of manufacturing establishments requiring water fronts, and water fronts, water privileges and dockage are useful, and there are railroads desiring to cross the stream and put abutments in the stream. (Page 51).

Question by Counsel for Mr. Appleby, owner: "Do you remember the fact that where the City ship canal terminated there was a canal that had been excavated by Adams and Moulton that ran from the City ship canal to the canal excavated by the Lehigh Valley Railroad Company and that the canal as thus excavated was sold by Adams and Moulton to the Lehigh Valley Railroad for a large sum of money; just the land under water, with the water that flowed into it from the public waters?" City's Counsel: "I object to that as incompetent, irrelevant and immaterial." Objection sustained. Exception, (Page 53).

There were four other witnesses who gave corroborative testimony for the owner. Wadsworth, Otto, Kingsley, and Bork.

City's Evidence on Question of Value.

In behalf of the City, four witnesses testified on the question of value, Gurney, Griffin, Boechat and Newerf.

Witness Newerf testified that in his judgment the land in question was worth about \$1.00 an acre.

On cross examination he testified: "My values are placed on the assumption that this is a public highway, (Page 59). * * * The riparian rights, if I had those, I think it would be worth much more an acre. I mean by riparian rights, the rights that owners have adjacent to the stream—the right to build docks, unload vessels there, build railroad bridges and piers; all the rights the land owners would have on the banks of the river, (Page 59, Fol. 104). * * * I would not sell adjacent land on the banks of the river for the same price. I would want several thousand dollars an acre; it is quite valuable along the stream; it runs into the thousands all the way up and down the stream, (Page 61, Fol. 107). * * * Large boats come up here to Hamburg street and they find it to their advantage to use the land and water together, and such

property, dockage property they call it, is worth very much more than inside land. I know of dockage property that is held for \$1,000.00 a front foot along there west of Hamburg street, just below Hamburg street and the same land not on the river can be bought for \$50 or \$60 a foot, so that nearness to the water, frontage on the water with the right to build docks having access to the water and the navigability of the stream makes that difference, (Fols. 107-8, Page 61).

"The bed of the river is a gravelly bottom, gravel, sand, etc. At the present time there is a bar at Seneca and Elk streets. That is the only point where you could not row a small boat, (Page 62, Fols. 109-110). The stream has been gradually filling up the last ten years with sand and gravel that is brought down from the country. In speaking of the value of the land under water, I think the public have a right to land and water both and my values are placed on that assumption, too," (Fol. 109, Page. 62).

Re-direct: "I may be mistaken in saying that the portion of the stream used by the large lake boats is entirely below Hamburg street. I understand that it extended up as far as the Union Iron Works, that is some distance south from the foot of Hamburg street," (Fol. 110, Page 62).

Frank P. Boechat, a witness for the City, testified in respect to land under the waters of Buffalo River taken by this proceeding: "Assuming that it is as I say, a natural water course, my estimate of the value of the bed of the river is that it has no value; separated in ownership from the adjoining shore it has no value."

On cross examination he testified: "I have had some experience with Cazenovia Creek. As to Cazenovia Creek, I don't think its bed had no value; it is a private stream: being a private stream I presume it has value," (Fol. 157, Page 87). "I am just keeping in mind Buffalo creek. I assumed in fixing my opinion of value that it was a natural water course and a public highway. When I said that in my opinion the bed of the stream had no value I meant that it could not be utilized for any purpose, (Fol. 158, Page 88). "I think that all loyal citizens have an equal right in that stream, (Fol. 159, Page 88). My opinion of value there is based on the assumption that the owner of the fee of the bed of the river has no more rights than any

other loyal citizen. I don't grant that the owner of the fee of the stream has any rights," (Fol. 162, Page 90).

Re-direct: "My estimate is based on the assumption that the ownership of the bed of the river is in different persons from that of the ownership of the abutting shores," (Fol. 162, Page 90).

On cross examination he testified that he bought land on Cazenovia Creek, a branch of the Buffalo River, and paid \$1,400 or \$1,500 an acre for it, (Fol. 157, Page 87).

The City's witness, Griffin, testified: "In my opinion the land that is to be taken in this proceeding has not got any value. I say that because the land is under water, and it is a navigable stream from the City line to Hamburg street; and assuming that that is a fact, the land under water has got no value in my judgment," (Fol. 124, Page 70).

On cross examination, he testified: "I think it is a public highway and a navigable stream, that is the ground on which I base my opinion as to valuation and the ground upon which I base my opinion that it is a highway is that the water runs down there," (Fol. 130, Page 73). "I don't consider any of its possibilities," (Fol. 131, Page 73). He also testified that if adjoining land could be widened by filling in portions of the river it would have some value. So they might fill in a great many acres in the stream if permitted; if the owners of the stream would permit it, (Fol. 128, Page 72). He also testified that the river had changed its course and left the old bed, (Fol. 133, Page 74).

He further testified: "I have known of sales of waterways where they were valuable. At the foot of Georgia street and Jersey street that had great value; also on Niagara River, between here and Tonawanda, where they paid the State quite a large sum for riparian rights." (The State acquired from Massachusetts and the Indians the lands along and under Niagara River.) "The land that the Lehigh Valley has taken in Lake Erie; also the Steel Works, that is going to be very valuable; *if the same rights existed in this river then it would have a like value,*" (Fol. 134, Page 75).

City's witness, Gurney, testified: "In my opinion the value of that land is nothing. I arrive at my conclusion from the fact that it is land under the water which cannot be utilized for any purpose," (Fol. 111, Page 633).

On cross examination he testified: "I know what land is generally held at on Buffalo River near the City; I don't

know what dockage property is worth along there; I should say \$200 or \$300 a foot; I know what property is worth just back of the river fronting on the streets merely, within 200 feet of the river; it is worth from \$40 to \$50 a foot front." Q. "What makes the difference in value between dock property and inside property there if it isn't being on the water, being on the water and the right to build docks?" A. "You can build docks on your own land if on the water." Q. "And go back?" A. "Yes, but you cannot go out in the bed of the river," (Fol. 113, Page 64). "I have known of the Lehigh Valley purchase of land and their digging canals near there; it depends altogether upon how well it can be utilized; whether the value of the land plus the cost of the improvement is the value of that now, or whether it is worth more than the value of the land plus the cost of the improvement. If it can be utilized for dockage property it is worth more; the adjoining property should be worth more if it can be used for dockage purposes," (Fol. 114, Page 64). "I say if the adjoining property owners have the right to build on their own property docks on the banks of this river; it gives that land greater value than some land half a mile back that has not the same privilege," (Fol. 116, Page 65).

"I have already stated that the docks owned by the Union Iron Works increase the value of that land; it would increase the value of the next land if there were docks there and large steamers could come up to it," (Fol. 116, Page 65).

"I don't know what rights go with the fee ownership of land as opposed to an easement merely in property that is a public highway. I have not considered the rights that go with a fee as contrasted with the ownership of an easement merely, so that I do not know what difference that would make in the value," (Fol. 116).

"My definition of a public highway is one not belonging to private individuals, one on which no taxes are paid, one which the public can utilize; *I mean that I consider that the public own all the rights in a public highway,*" (Fol. 115, Page 65).

"In my estimate of values what I did consider was that this land could not be used which was covered with waters and therefore of no value. If in places the stream were too wide and they wanted to fill in and make additional

land for instance up here is a narrow strip along the Lackawanna, and supposing they wanted to widen that out 20 feet, I would consider the right to fill in that 20 feet had value for them. If they did not have the right to fill in and the man who owned the bed of the stream under water had that right, and he could control it, I would consider that right worth something," (Fol. 117, Page 66).

On re-direct examination he testified: "I don't know of any use to which a highway, or the land in a highway can be put by the owner of the bare fee, where it is disconnected in ownership from the abutting property. The case of the Buffalo River, I should say is a parallel case, and the bed of the river is separate in ownership from the banks, and is of no value, that is what I mean to testify to. Those cases where I said in Niagara River, and elsewhere, that the right to dock out is of value is where the State, in the exercise of its sovereignty, has granted the right to construct piers out into the navigable waters of the stream or lake," (Fol. 118, Page 66).

Those were all of the witnesses who testified as to value.

The City's witnesses were mistaken in respect to the rights of the owner and in the assumption that the bed of the river was separate in ownership from the banks. The ownership of the land under water carried the right to build wharves, (*Williams v. Mayor, etc.*, 105 N. Y. 429) and the evidence showed that the owner had adjacent lands. With those mistakes corrected their testimony was that the property was valuable, and that property with riparian rights was very much more valuable than property without them.

The trustee of the Ogden Land Company owned both the fee of the bed of the river and adjacent lands. That appears from the statements of title on pages 37, 45, 117 to 120; the original map of Lovejoy & Emslie's survey, pages 102-3; the assessors' map showing changes in the channels of the river, Exhibit 6, after page 118; and testimony of Marsden Davy, pages 102 to 104.

Buffalo Creek was a non-tidal, non-boundary, fresh water stream. The conveyances through which the trustee of the Ogden Land Company derived title cover so much of the stream as was within the Indian Reservation, including the soil under water. He became the owner of

the land on both sides of the stream as well as the bed and of all rights therein.

Chenango Bridge Co. v. Paige, 93 N. Y. 178.

The People v. Platt, 17 Johns. (N. Y.) 195.

Curtis v. Keesler, 14 Barb. (N. Y.) 511.

Child v. Starr, 4 Hill. 369, (N. Y.).

Rogers v. Jones, 1 Wendell, 237, (N. Y.).

The stream was not naturally navigable. *Id.* See Point 35 *Infra*.

The proceeding to take the land assumes that it is owned in fee simple and the owner's title cannot be questioned in the proceeding. In re City of Yonkers, 117 N. Y. 572. The commissioners were appointed to appraise the property in fee simple and not to decide who owned it. The opinions of the witnesses on any other basis were entitled to no weight as evidence.

Objections to power of commissioners to try the title and exceptions to the rulings of the commissioners on that question, and to the admission of irrelevant and incompetent testimony.

The City produced a witness who testified that he was a searcher in the Erie County Clerk's office and made the abstract of this property in the Erie County Clerk's office, and was asked in respect to a deed and map, (Fol. 165, Page 91).

The land owner's counsel then asked the object of the proof that was being offered, whether any part of it is for the purpose of showing any adverse claim to the property in question or any claim to an adverse interest or easement in the property in question, (Page 92).

The counsel for the City then stated that "This evidence is being offered for the purpose of showing that the Ogden Land Company after it acquired the title to the property in the Indian Reservation laid the property out in lots, and that they sold the property according to the lots which they laid out abutting on the Buffalo River, sold all the lots and that the conveyances were to the lot lines which abutted on the river." (Fol. 166, Page 92).

The land owner's counsel took the objection that the commissioners have no power to determine disputed claims to the property; that the province of the commission-

ers is to determine the value of the *property* proposed to be taken and not to determine conflicting interests of claimants to the property; and if this evidence is offered for the purpose of establishing any right or claim of other persons to the property in question, it raises a question that this proceeding is not a proper one to determine, (Fol. 166, Page 92).

By Commissioner Greiner: "I assume this evidence is given for the purpose of proving the fact as to just the conditions that exist in regard to Buffalo River," (Fol. 166, Page 92).

City's counsel offered a map and deeds by which he claimed the Ogden Land Company, or the trustees, conveyed the lots according to this map abutting on Buffalo River, (Fol. 167, Page 93).

Owner's counsel: "For what purpose?" (Fol. 167, Page 93).

City's counsel: "As evidence in this case to show the condition of the land proposed to be taken."

Owner's counsel: "I object to the map on the ground that its authenticity has not been proved, and generally to the deeds and to the proposed evidence."

"First: That these proceedings are inappropriate for the purpose of trying the title to the property in controversy. * *

"Third: That the commissioners have no power to determine disputed claims to the property in question."

"Fourth: That the commissioners have no power to adjudge that the premises in question are a public highway; and I object to evidence given for the purpose of establishing the fact of its being a public highway or of showing any easement in it in the City or any person other than those to these proceedings. * *

"Seventh: That no deduction should be made on account of any claim to an easement in the premises adverse to the trustee."

"Eighth: That the evidence is inadmissible for the purpose of establishing grounds for an award of less than the value of the premises taken."

The owner's counsel also objected to the authenticity of the map—that it does not purport to be made, nor was it made, nor was it shown to have been made, by authority of any person who owned any of the land at the time it

was made; that there have been no conveyances shown to have been made by the trustees of the Ogden Land Company with reference to that map, and that it is incompetent for the purpose of showing title out of the trustees of the Ogden Land Company, and that the map does not in fact accurately describe the land embraced in such deeds as were executed by the trustees of the Ogden Land Company, (Fols. 168 to 171, Pages 93-4).

The commissioners overruled the objections and received the map in evidence and the land owner excepted. It was marked Exhibit 3, (Fol. 170, Page 94).

The City's counsel offered again one of the deeds previously offered and it was objected to as above stated, (Fol. 171, Pages 94-5).

The land owner's counsel objected to it, first on the ground that it does not cover any of the land in controversy in this proceeding, second, upon the grounds heretofore taken to deeds offered in behalf of the petitioner.

The commissioners overruled the objections and the defendant's counsel excepted, (Fol. 172, Page 95).

The deed was then received in evidence. The description in it is set forth in the case and begins at a designated post and runs thence from post to post certain courses and distances to the place of beginning and does not include any of the land in question, (Page 95).

The City then offered other deeds to each of which the defendant took the same objections as to the previous deed, which the commissioners overruled, and the defendant excepted. The deeds were received in evidence and are set forth in the case, (Fols. 172 to 177, Pages 95 to 98).

The City offered in evidence field notes of survey by Lovejoy and Emslie of part of Buffalo Creek Indian Reservation into lots and of another part by James Sperry, and a map.

The land owner objected to the map, that it is not authenticated in any way, that it is not an original map made by Lovejoy & Emslie and is not the best evidence. The objection was overruled and the map received in evidence and the defendant excepted, (Fol. 179, Page 99).

The defendant further objected to the field notes that the deeds read in evidence do not cover the property in question in this proceeding. The objections were overruled and the field notes were received in evidence and the defendant excepted (Fol. 180, Page 99).

Enough of the field notes are set forth in the case to show their character and the boundaries of the lots as described in the notes of the surveyors. (Pages 108, 111, 112).

A map was produced by William H. Slade, as a witness for the city, unauthenticated, showing lot lines running to the river without any line along the river. The map was on such a small scale that lines 10 to 20 feet apart would be co-incident and would show as a single line. The defendant objected to it as incompetent—there is no evidence that any conveyance by any trustee of the Ogden Land Company was ever made with reference to this map and the same is not the best evidence. It is not an original map, it is not signed or authenticated by anybody and is not shown to have been used by anybody. The objections were overruled, the map was received in evidence and the land owner excepted. (Fol. 181, page 100).

Mr. Greiner, the law member of the commission, asked a witness this question, viz: "Assuming that this is a public highway and that the only interest that the person has in whom the title is, is the same as that of any other citizen, same as your interest, the right to go in and upon it, what would you say then was the value?" (Fol. 80, page 46).

Owner's counsel objected to the question. The commissioners overruled the objection and the owner's counsel excepted. (Fol. 80, page 47).

Ans. "There isn't any title practically in that then. I think the value is just the same, but I don't know who would get the money. I think the value is just the same, the land is there." (Page 47).

Other evidence objected to as incompetent was offered and received and the owner excepted. The evidence, objections, rulings and exceptions are stated in the Assignment of Errors and numbered twelfth. (Page 148).

The city offered in evidence a provision of the act incorporating the City of Buffalo (Laws of 1832, Ch. 179, Sec. 40), which is as follows, viz: "All those portions of Big and Little Buffalo Creeks, within the bounds of said city be and are declared to be public highways"; and subsequent amendatory acts substantially the same. (Page 91).

None of those acts provided for compensation or process of law to take the property. In 1832 the B. C. Indian Reservation was in possession of the Indians and was not within the bounds of said city, and was not until an enlargement of the city boundaries in 1853, and was not affected by the act of 1832.

The owner's counsel objected to those acts on the ground that the State of New York was not at the time of their passage, the owner of the land in question and could not by a Legislative Act make it a highway without compensation to the owners. (Page 91).

The commissioners admitted them in evidence but ruled that they agreed with the defendant's counsel that the State of New York could not take anybody's property without just compensation.

Little Buffalo Creek mentioned in the act was a branch of and was as large as Big Buffalo Creek above Seneca Street (Fol. 159, page 88), but instead of being a highway, has been filled in and built over. (Pages 49, 88). The passenger station of the New York Central Railroad is on it, as well as many other large buildings and a city school house. (Page 88). Little Buffalo Creek was about four miles long, and has ceased to exist as a waterway. Little Buffalo Creek left Big Buffalo Creek (now called river) above Seneca Street and rejoined it again some ways below Hamburg Street.

Original map and field notes of Lovejoy and Emslie's survey showing that lots laid out by them did not extend to or include lands in Buffalo River.

Marsden Davey, a witness in behalf of the owner, testified (pages 102 to 106): "I am a surveyor and civil engineer. I knew Peter Emslie well. During the War of the Rebellion I was his assistant. I was with him four or five years before I started in business for myself as civil engineer and surveyor. After Peter Emslie's death, the original field notes and map from that survey came into my possession, and I have the *original* map here. *I have the original office map*, (Exhibit 7) and I have also the *original* field notes covering that survey. I have his original field notes in his own handwriting. This is a map

of that survey made by Peter Emslie. In the field notes the lots nearest to the river terminate at stakes standing on the bank of the river. *The lots nearest the stream terminate at stakes standing on the bank of the river.* The lots nearest the stream terminate at stakes laid down in the field notes. On this map there are lines laid down apparently as the margin of the bank of the stream and also red lines. Near the bank of the creek of the lots surveyed by Lovejoy and Emslie there are *two lines, one is black and the other red.* I have compared the red line with some of the field notes of survey. *The black lines on this map indicate the top of the bank. The red lines indicate the courses and distances of Lovejoy & Emslie's survey and are according to their field notes, and are drawn on this map straight from one post to another, apparently the distance put down in the field notes.* If you will excuse me, this line does not indicate the margin of the stream, *the top of the bank*, in some places the stream is further away from that line than others. The bank of the stream in some places curves where the course laid down in the survey was straight. I have surveyed lots according to Lovejoy & Emslie's survey according to their field notes. * * From the places where the stakes were stuck on the bank to the margin of the water there would be on an average a distance of *12 to 15 feet horizontal*, so that there would be *about 12 to 15 feet of land* between the margin of the stream and where the stake was stuck if you went down perpendicularly from where the stake is.

"In places the stream has changed its course and bed. I know the banks have changed since that survey materially. In some places some of the lands are cut off; other places gradually washed from one side and added to the other. I know of one particular case in Lot 14. * * It has cut through in that shape (indicating) since my time; cut off $2\frac{3}{4}$ acres of this lot and added it to that side, besides the bed of the stream. I think there are many places where land has been added to the north bank of the stream by gradual accretion, but I can't call to mind any particular point just at the present moment. There have been additions on the Lovejoy and Emslie survey to the land *by gradual accretion*. I know there have been, but I can't call

them to mind just now. I presume there is land above water now in Lovejoy & Emslie's survey that was under water at the time of the survey. I can't tell without calculating it about how much longer the side lines of the slopes (he said lots—'slopes' is a clerical error) terminating at the stakes than they are given in the survey, if they extended to the center of the stream. There is such a variation. I couldn't give you an average; some of them would extend several chains longer, and most of them would be pretty nearly a chain longer; so that the side lines would be half the width of the river longer than what is laid down in the field notes and maps of the survey."

The map was designated as Exhibit No. 7 and it was stipulated that it might be read on the argument. It is too old to copy.

It will be seen by reference to the assessors' map introduced by the city that since the Lovejoy & Emslie survey the river has changed its course, and additions have been made to the land between the lot lines and the river, apparently fifty to one hundred feet in width, or more, and in places the full width of the stream. (Exhibit 6, pages 118 to 119). The map shows lines at four periods, 1854, 1870, 1890 and 1902.

Ernest Siegesmund, a civil engineer, testified: "I have made some computations as to how much the area of some of the lots would be increased if they were extended to the center of the river from where the surveys located the stakes on the bank of the river. Lot 192 is put down in the survey as containing 81.41 acres; if the line were extended so as to include the water to the middle of the stream it would increase the area of that lot 20.70 acres. If lot 178 were extended, its area would be increased 8.88 acres; it is put down on the map as containing 37.90 acres. Lot 196 is put down as containing 18.92 acres, to so extend the line to the center of the stream would increase the area 1.46 acres. Lot 187 is put down as 4.80 acres, to extend the line to the center of the stream would increase it 78/100 of an acre. All of the lots where the survey indicates or states that the side lines terminate at stakes standing on the bank of the river would be increased materially in area if their lines were extended to the center of the river to the amount I have mentioned before. Those I have given

specifically, and all of the other lots, would be materially increased in area, and the length of the side lines would be materially increased. In Lot 192, to extend the side lines to the center of the stream would increase them about 116 feet; the side lines of Lot 178 would be increased about 90 feet; and those of Lot 196 would be increased 80 feet." (Fol. 184, page 102).

This is evidence that the lots did not extend beyond the designated posts.

Starr v. Child, 5 Denio, 612.

The field notes also described the surface of the land and its quality and quantity and show that no part of the lots is covered by the water of the river.

George H. Norton, as a witness for the city, testified: "I am Assistant Engineer in the Bureau of Engineering and have been for about 12 years." Among other things he testified to on cross examination was that "in the case of the South Buffalo R. R. it was stated that it would cost \$25,000.00 more to build a bridge across the river without piers in the stream. I made such an estimate." (Fol. 143, page 80; see testimony of VanHorn Ely as to abutments (Fol. 89, page 51). "There is quite a gravel pile just below Seneca Street bridge." (Fol. 145, page 81). The river has been *dredged* the whole length from its mouth to Hamburg Street for the purposes of navigation. (Fol. 149, page 83). "I don't know how much they dredged from Hamburg Street to the Union Iron Works, that has been done by *private contract* so as to get as good depth as we had below that. They maintained a normal 19 foot channel." (Fol. 149, page 83). "The port of Buffalo, I believe, ranks third or fourth in tonnage in the country." (Fol. 148, page 83). He also mentioned numbers of artificial ship canals in the vicinity and what use was made of them and of the river below Hamburg Street. (Fol. 148, pages 82-3).

The level of the water in Buffalo River depends on the stage of the water, the amount of the water running into creek and the stage of the water in the lake. (Fol. 137, page 76).

There is a change going on, or has been in the past, in the lake levels—Lake Erie levels. They constantly vary, very material changes. (Fol. 187, page 77). The land is

practically level away back a long distance. (Fol. 138, page 77).

"Quite a number of lumber yards and lumber interests there are on artificial channels, or canals, in that section of the city. Those that I have mentioned are the largest commercial interests in the city almost." (Fol. 149, page 83).

On direct examination he testified: "I should think you could get a channel in the upper end of the stream about 2 feet deep and 25 or 30 feet wide, but that would be a fair average channel in the summer season; you couldn't get it all the time." (Fol. 152, page 81).

The Chief Engineer of the Board of Public Works testified in respect to the map Exhibit 2: "It was made a year ago and is somewhat changed but not enough to make any material difference on the map. That map is drawn on a scale of 300 feet to the inch." (Page 38). "I have measurements showing the width of the stream at various places; I have an *accurate* survey; they are on a map I have on a good deal larger scale, but they are not on that map. A map drawn from the scale—this one has a slight *defect*—it wouldn't show any material difference in the depth of the water. To show any difference *we have got to get a map on a good deal larger scale* than this is.

"In some places it is quite narrow and in some places there is considerable width and bars where the water flows over in very small quantities; in some places the water is deep and in others it is shallow, but I know of no places where bars extend way across the creek—sort of islands here and there." (Page 38).

Approximate dimensions of river taken from city's map Ex. 2, drawn on a scale of 300 feet to an inch; the dimensions not being specifically set down on the map.

Ernest Siegesmund, a Civil Engineer and Surveyor, who was a witness for the owner, testified that he had examined a blue print of the map marked Exhibit 2, produced in behalf of the City, before the commissioners, and assuming that it was drawn on a scale of 300 feet to the inch, as it purported to be, the distance as shown on the map from the Indian Reservation line near the foot of Hamburg Street

to the City Line is 7.023 miles, the area within the bounds of Buffalo River as shown on this map is 141.0055 acres. The first 1300 feet averages 270 feet in width, the second 1600, 240; third 2530, 240; fourth 2450, 180; and from there varying in width to 70 feet. (Fol. 71, page 41).

Commercial environment and cost to improve.

The property is situated in the City of Buffalo, a City of more than 400,000 inhabitants and a port ranking third or fourth in tonnage in the country. It is at the eastern end of navigation in the chain of great lakes and the western terminus of the Erie Canal and is a great railroad, manufacturing and commercial center. Its harbor is mostly *artificial*, made by excavating and enlarging what was called Buffalo Creek and miles of ship canals connecting with it, excavated through what was dry land. The property begins at a point to which the river has been dredged and rock excavated so as to make it navigable, and a channel has been excavated by private contract from that point some distance above it. In that vicinity are the largest commercial interests in the city almost, for which waterways are indispensable. The principal steamboat wharves, warehouses and elevators occupy the river's front up to Hamburg Street. Land along the river above Hamburg Street is worth thousands of dollars an acre. It is a growing section. Waterways are still being excavated as there continues to be a demand for them. (Pages 35, 39, 51, 53) and in the last few years sales of land under water have been made at prices showing that land under water with riparian rights is worth more than the uplands, (Fol. 76, page 44) and dockage property has large value. The Lehigh ship canals are 200 feet wide and the channel of Buffalo River between docks below Hamburg Street is generally 170 to 200 feet wide.

City's witness Newerf testified: "I know of dockage property that is held for \$1000.00 a front foot; along the west of Hamburg Street, just below Hamburg Street, and the same land, not on the river, inside, can be bought for \$50 or \$60 a foot, so that nearness to the water and a frontage on the water, with a right to build docks, having access to the water, and the navigability of the stream makes that difference." (Page 61).

City's witness, Gurney, testified that dockage, where the Union Iron Works are situated, above Hamburg Street, was worth \$200 or \$300 a foot; back of the river fronting on streets merely, within 200 feet of the river it is worth from \$40 to \$50 a foot front (Fol. 113, page 64) and it would increase the value of the next land if there were docks there and large steamers could come up to it. (Fol. 116, page 65).

Mr. Norton, the City's Engineer and witness, testified that to dig canals like those of the Lehigh Valley Railroad 200 feet wide through ground on the Tift farm, the surface of which is 5 feet above water level, and construct docks, \$35 a foot on each side would be ample. (Fol. 151, page 84).

There is a wide margin for profit between \$35 a foot, the cost of improvements, and \$200 to \$1000 a foot for the completed work. The river has considerable depth already for several thousand feet above Hamburg Street and not half as much dredging is needed as for the canals through dry land. The bottom is sand and gravel above Hamburg Street and there is little if any fall in the river. The City Engineer testified: "I should think it doubtful whether there is any fall in the river." (Fol. 138, pages 77 and 81).

The river has been *dredged* from its mouth to and above Hamburg Street for the purposes of navigation. (Fol. 149, page 83). Above Hamburg Street the work was done by private contract. (Fol. 149, page 83).

The river above Hamburg Street for a considerable distance averages 270 feet wide (Page 42), and there is more room for docks, and the conditions are as favorable above Hamburg Street, as below.

The facts testified to by the City's witnesses as well as by those called in behalf of the owner show that the property has very substantial value, and that the owner's adjoining land is lessened in value materially by severance from the land under water. These are facts that were not controverted. The Appellate Division said: "The evidence shows conclusively that such property is valuable, that it is more than nominal is conclusively established." (Page 122).

TITLE.

The property, which was part of the Buffalo Creek Indian Reservation, was never owned by the City of Buffalo, the State of New York, or the United States.

It was granted by the Crown of Great Britain in 1628 the time of James I to the Colony of Massachusetts Bay by a grant which included ports, rivers and waters as well as land. (Fol. 210, page 117). Massachusetts at the time of the Revolution succeeded to the rights of Great Britain and the Colony of Massachusetts Bay. Thirty thousand acres were set apart as a reservation for the Seneca Nation of Indians. It was called the Buffalo Creek Indian Reservation and included the part of the stream taken in this proceeding. From Massachusetts, by various mesne conveyances, and by treaty with and deed from the Indians, the title and possession became vested in Charles E. Appleby, as surviving trustee of the Ogden Land Company. (Fol. 77, page 45).

The property in question has not been conveyed by and is still owned by him unless he is deprived of it by these proceedings.

Under the decisions as to the Genesee River at Rochester, N. Y., in the cases of *Starr v. Child*, 4 Hill, 369 (N. Y.) and *Child v. Starr*, 5 Denio 599, which have since been followed in the State of New York (*Matter of Brookfield*, 176 N. Y., 145; *City of Geneva v. Henson*, 195 N. Y., 463 and other cases), conveyances by such descriptions of lot lines as those in the field notes of Lovejoy & Emslie's survey and their original map of that survey, produced and testified to by Marsden Davey, (pages 102-4) do not convey anything beyond the posts and lines drawn between them and do not include any interest in the bed of the stream or water of the river. The lots thus laid out left 12 to 15 feet horizontal between the posts and the margin of the stream. By changes in the course of the river, as shown on the assessors' map (City's Map Ex. 6) and other evidence, there have been additions of 50 to 100 feet in width from land that was in the bed of the stream, and in places more than that. (Fol. 187, page 103). This proceeding

severs it from the land under water and greatly depreciates it in value as appears from testimony of witnesses for both parties. Riparian rights do not exist without lateral contact with the water.

The award was made on erroneous principles.

At the close of the testimony, the City's counsel stated to the commissioners: "The only person or corporation whose rights are sought to be taken in this proceeding are the rights of the trustees of the Ogden Land Company", without stating what those rights were or defining them so that the commissioners would know what to appraise, if those rights were less than the unencumbered fee. (Fol. 193, page 107).

Coupled with the decisions of the commissioners overruling the objections taken to the power of the commissioners to try the title, and to the receipt of evidence to show grounds for an award of less than the value of the property taken, and to the receipt of deeds, which the counsel stated were offered to show that the Ogden Land Company conveyed all the lots, which, he said, were laid out abutting upon the river (which the Emslie map produced by Marsden Davy and other evidence shows was not true), and to the receipt of unauthenticated maps which did not accord with the field notes or original map of the survey, and followed by an award of six cents for property which was conclusively shown to be of large value, the conclusion is irresistible that the commissioners adopted the theories and claims made by the City's Counsel and that their award was made on erroneous principles.

The proceeding was to take the property in fee simple without excepting any interest and the City was precluded from disputing the title, but the rulings of the commissioners were otherwise. There was no specification of what land Mr. Appleby owned or the interest other than the fee simple, and if he did not own the whole and only his interest is taken, the subject of appraisal was undefined. The commissioners were not authorized to determine for themselves what they should appraise. The description was such that they could not tell what to appraise.

Exceptions to Commissioners' Report.

The commissioners made a report awarding six cents to C. E. Appleby, etc. He duly filed and served the following exceptions to said report, viz. (P. 17):

"First. The sum awarded is not just compensation for the property taken.

"Second. The said report is contrary to and in violation of Section 6, Article 1 of the Constitution of the State of New York, which provides that private property shall not be taken for public use without just compensation.

"Third. The said report is also contrary to and in violation of the *Constitution of the United States*, which provides that private property shall not be taken for public use without just compensation and the sum awarded by said report is less than just compensation.

"Fourth. The award of six cents is only nominal compensation while the property taken is of much greater value.

"Fifth. The owner of the fee of the land was entitled to substantial damages and the sum reported by the Commissioners is only nominal and much less than the damages sustained by the owner by the taking of the property.

"Sixth. The report does not correctly report the facts or all the evidence.

"Seventh. The report is contrary to law, the facts and the evidence."

Assignment of Errors P. 137, 147.

Proceedings after the report.

A motion was made in behalf of the City at Special Term of the Supreme Court, in the County of Erie, to confirm the report. Defendant's counsel opposed the motion on the evidence, objections and exceptions taken before the commissioners and on the exceptions to the report (P. 36) and other grounds, among them that the notice of intention is to take the property in fee while the award does not cover what the notice of intention does, or just compensation for what the notice declares it is intended to take; that the property is not sufficiently described; the commissioners' want of jurisdiction to try the title and upon other grounds

specified in an affidavit and notice of motion therein referred to. (P. 35).

The Court overruled the objections and exceptions and confirmed the report. (Page 35). The order or decree thus made was enrolled and recorded in the office of the clerk of Erie County, (Page 11), and has all the force and effect of a judgment. (Code Civil Procedure 3373).

The defendant made a motion to set aside the report and order of confirmation. (Pages 29 and 34). The Court denied the motion. (Page 34).

The defendant appealed from the order confirming the report to the Appellate Division of the Supreme Court, Fourth Judicial Department (Page 1) also from the order denying the motion to set aside the report and order of confirmation. (Page 2).

A case was made and settled containing the exceptions before the commissioners and to the report, and all of the evidence and proceedings before the commissioners. (Pages 107 and 119).

Reversal by Appellate Division.

The Appellate Division reversed the order of confirmation and directed a new appraisal before other commissioners (Page 120) and in their opinion said: (Page 122 of Record, 116 App. Div. Rep. 556). "*We think it cannot be reasonably contended that the ownership of the fee of the bottom of Buffalo River is not as to the owner a valuable property. * * We think the citation of authorities is unnecessary to demonstrate that the appellant was the owner of valuable property. * * The evidence shows conclusively that such property is valuable * * that it is more than nominal was conclusively established; that it has an intrinsic value cannot be doubted*" and "*We think the determination is abhorrent to justice and to any rule of equity which has been enunciated by the Courts in any well considered case.*"

They also reversed the order denying the defendant's motion to set aside the order of confirmation and report. (Page 120).

Certifying Questions for Review by Court of Appeals.

The orders made by the Appellate Division reversing the orders of the Special Term and directing a new appraisal were not orders finally determining the proceedings and were not appealable. (Code Civil Procedure, Section 190; Matter of Gibson, 195 N. Y. 466).

In behalf of the City, a motion was made under Subd. 2 of Section 190 of the Code of Civ. Pro. for allowance of an appeal and a certificate that questions of law had arisen which in their opinion ought to be reviewed by the Court of Appeals and proposing questions to be certified for review.

The defendant opposed the motion (Page 123) and objected to the questions. *Id.*

The Court granted the motion and certified four questions for review, viz:

1. Is Charles E. Appleby, as surviving trustee of the Ogden Land Company, *under the facts* in this proceeding, entitled to an award of more than six cents damages on the City of Buffalo acquiring the fee to the lands under the waters of the Buffalo River in eminent domain proceedings, taken pursuant to its revised City charter, for the purposes of a public highway?

2. Were the appraisal commissioners authorized and empowered, *under the facts* in this proceeding, to fix the actual damages of Charles E. Appleby, as surviving trustee of the Ogden Land Company, on the City of Buffalo acquiring the fee to the lands under the waters of the Buffalo River, at six cents, and to award said sum as and for the just compensation to be made to said Charles E. Appleby, as surviving trustee of the Ogden Land Company?

3. Does the City of Buffalo in this proceeding show a necessity for acquiring the fee of said lands?

4. Did any of the exceptions call for a reversal of the order confirming the appraisal commissioners' report. (Page 123).

The purpose for which the property was taken is immaterial. The owner was entitled to the value of the property. Matter of City of N. Y. 190 N. Y. 350.

The defendant made a motion to dismiss the appeal to the Court of Appeals for want of jurisdiction. The motion

was held and argued and submitted with the appeal. The Court overlooked the motion and in deciding the case failed to decide the motion but afterwards handed down a separate decision denying it after its attention was called to the omission by another motion. (189 N. Y. 163, 527).

Decision of Court of Appeals.

Instead of reviewing the questions certified, and no other, and certifying their determination on them to the Court below, as directed by the Code of Civil Procedure, subd. 2, Section 190, when questions of law are certified to them, the Court of Appeals rendered a final judgment reversing the order of the Appellate Division and affirming the order of the Special Term, with costs to the City of Buffalo in the Court of Appeals and Appellate Division, amounting to \$424.94. (Page 130).

The Court of Appeals was not authorized to render a judgment for costs against the owner.

It was not empowered to determine the whole case or to render a judgment. The whole case was not before it. Its authority was limited to a review of certified questions of law and to certifying its determination on the questions to the Court below.

Graver v. Faurot, 162 U. S. 435.

Cross v. Evans, 167 U. S. 60, 65.

Code Civil Procedure, Section 190, Subd. 2.

A general appeal bringing up the whole case could not be taken. The questions were not questions of law. The order was made on the facts and in the discretion of the Appellate Division, its discretionary order was not reviewable and could not be made so by certifying questions.

The defendant made a motion for re-argument or for other relief on the ground that the Court overlooked and did not decide the motion to dismiss the appeal and had made mistakes as to material facts and overlooked controlling decisions, and that they had misinterpreted the certified questions, and asked that the questions be sent back to the Appellate Division for re-settlement. The Court thereupon handed down a decision denying the motion to dismiss the appeal and denying the motion for re-argument or other relief. (Page 129).

The judgment of the Court of Appeals was remitted to the Appellate Division where a pro forma order without further consideration was made and the record was filed and the judgment entered in the office of the Clerk of the County of Erie, he being the Clerk of the Court having the custody of its records. (Pages 130 to 133). An application was made to this Court for a Writ of Error. It was duly allowed (Pages 135, 154, 155) and a return to the Writ has been made, with the Assignment of Errors annexed. (Page 155).

There was no question certified in respect to the order of the Appellate Division, reversing the order of the Special Term, denying the motion to set aside the report and order confirming it, and granting a new appraisal, and the decision upon that motion and order made on that motion were not brought up for review by the Court of Appeals.

POINTS.

I.

"The constitutional provision that no person shall be deprived of life, liberty or property without due process of law * * extends to every proceeding which may interfere with those rights whether judicial, administrative or executive." Just compensation "is an essential element of due process of law."

C. B. & Q. R. R. v. Chicago, 166 U. S. 226, 234.

Stuart v. Palmer, 74 N. Y. 184, 191.

Heyward v. Mayor, 7 N. Y. 314, 324.

An award of 6 cents for the fee of over 141 acres of land, within a City of more than 400,000 population, is a *prima facie* case of a violation of the 14th Amendment. The Appellate Division in their unanimous opinion said the award is "abhorrent to justice." (P. 122).

In C. B. & Q. R. R. v. Chicago (166 U. S. 234) Mr. Justice Harlan said: "But a state may not, *by any of its agencies*, disregard the prohibitions of the Fourteenth Amendment. *Its judicial authorities may keep within the letter of the Statute prescribing forms of procedure in the*

*courts and give the parties interested the fullest opportunity to be heard, and yet, it might be that its final action would be inconsistent with the Amendment. In determining what is due process of law regard must be had to substance, not to form. * * Can a State make anything due process of law, which, by its own legislation, it chooses to declare such? To affirm this is to hold that the prohibition to the State is of no avail, or has no application where the invasion of private rights is effected under the forms of state legislation * * If compensation for private property taken for public use is an essential element of due process of law as ordained by the 14th Amendment, then the final judgment of a state court, under the authority of which the property is in fact taken, is to be deemed the act of the state within the meaning of that Amendment."*

Also, on page 236: "*The mere form of the proceeding instituted against the owner, even if he be admitted to defend, cannot convert the process used into due process of law, if the necessary result be to deprive him of his property without compensation.*"

In *Heyward v. Mayor of N. Y.* (7 N. Y. 314, 324) the Court said: "*Certain it is that no honest legislature or just government would be guilty of the moral piracy of failing to recognize and fulfill the duty of making just compensation where private property should be taken for public use.*"

Mr. Justice Harlan also says in 166 U. S. 237: "*In Sinickson v. Johnson, 17 N. J. Law 129, 145, it was held to be a settled principle of universal law, reaching back of all constitutional provisions, that the right to compensation was an incident to the exercise of the power of eminent domain; that one was so inseparably connected with the other that they may be said to exist, not as separate and distinct principles, but as parts of one and the same principle * *. And in this there is a natural equity which commends it to everyone. It in no wise detracts from the power of the public to take what may be necessary for its uses; while on the other hand, it prevents the public from loading upon one individual more than his just share of the burdens of government, and says that, when he surrenders to the public, something more and different*

from that which is exacted from other members of the public, a *full and just equivalent* shall be returned to him."

Nominal damages not "just compensation."

A NOMINAL AWARD FOR THE *FEE* OF LAND TAKEN WOULD IN NO CASE BE JUST COMPENSATION. It would not be "a full and fair equivalent."

"Nominal" means "existing in name only."

Nominal damages are usually given in recognition of a right and not as *compensation* for the property taken.

"Just compensation" means "*a full and fair equivalent*" for the thing taken, and in no case less than "the value of the property."

Matter City of N. Y., 190 N. Y. 350.

So. Buf. R. R. v. Kirkover, 176 N. Y. 301.

Matter Com. Public Works, 135 N. Y. Ap. Div. 569.

Sinickson v. Johnson, 17 N. J. L. 129, 145, cited in C. B. & Q. Ry. v. Chicago, 166 U. S. 237.

Nominal damages are defined in 8 Am. & Eng. Ency. Law (2 ed.) p. 553, as "such as are awarded *not as compensation* for an injury, but merely in recognition of the plaintiff's *right* and its technical infraction by the defendant."

The Court of Appeals' opinion says (P. 127): "They determined that the respondent was only entitled to *nominal damages* and this view was confirmed by the Special Term, but has been overruled by the learned Appellate Division."

This was not because the land was valueless, but because the commissioners, misled by the City, thought the owner's title was defective or so burdened as to be only a "theoretical right."

They did not state in their report that the value of the land was six cents, but that six cents was the sum to which the owner was entitled, evidently basing that conclusion upon mistakes of law in respect to the rights of the owner.

In the above entitled proceeding there was drawn in question the validity of an authority exercised under the State of New York on the ground that it was repugnant to the Constitution of the United States and the decision

of the highest Court of said State was in favor of its validity and against the plaintiff in error, by whom such repugnancy was set up. By such decision and the judgment entered thereon, the plaintiff in error has been deprived of property without due process of law and without just compensation and has been denied the equal protection of the laws; and said decision and judgment are repugnant to section 1 of the 14th Amendment to the Constitution of the United States (Pages 4, 17, 20, 25, 36, 130).

(Assignment of Errors, specif. first, page 36; second specif., page 136; seventh specif., page 147; twentieth specif., page 152.)

The plaintiff in error excepted to rulings of the commissioners under which they erroneously received evidence affecting the amount they should award, including incompetent evidence, and to their jurisdiction to try the title, and to the receipt of evidence by them to establish grounds for an award of less than the value of the property taken. (92 to 101). He duly excepted in writing to their report on the ground that the owner of the fee of the land was entitled to substantial damages and the sum reported is only nominal and much less than the damages sustained by the owner and less than just compensation and that the report is contrary to and in violation of the Constitution of the United States, which provides that private property shall not be taken for public use without just compensation, and that the report is contrary to law, the facts and the evidence. (Record, Page 17).

The specification that the sum awarded was less than just compensation pointed out specially wherein there was not due process of law which requires due compensation.

2 Story on the Constitution Sec. 1956.

The order confirming the report recites that the defendant's exceptions to the report, duly filed and served, were read in opposition to the motion to confirm it. (Record, Page 36) The Court after hearing the objections and exceptions overruled them by confirming the report, thereby deciding against the defendant on the constitutional question. (Page 36).

A case was made, settled and signed by the Judge, containing all of the proceedings, including the exceptions, and

on it the Appellate Division heard an appeal by the defendant and *reversed* the order of confirmation. The exceptions were thereby sustained. (Pages 11, 120).

The Appellate Division certified questions for review by the Court of Appeals, one of which was—"IV. Did any of the exceptions call for a reversal of the order confirming the appraisal commissioners' report?" (Page 124).

The Court of Appeals answered that question "No" and rendered a final judgment, reversing the order of the Appellate Division, and confirmed the order of the Special Term which overruled the defendant's exceptions to the report on the ground that it was contrary to the Constitution of the United States. (Page 130).

The judgment of affirmance of the decision of the Special Term, which in legal effect declared that the rights asserted by the defendant under the Federal Constitution were not infringed, necessarily denied the Federal rights set up by the defendant; for the judgment could not have been rendered without deciding adversely to such claims of right.

C. B. & Q. R. Co. v. Chicago, 166 U. S. 231-2.

Therefore, the Supreme Court of the United States has jurisdiction to review the judgment on Writ of Error. *Id.* 232.

The exceptions to the commissioners' report were well taken. (Specif. seventh, pages 146 & 7).

The Court takes judicial notice of the provisions of the Constitution.

Bridge Propr. v. Hoboken Co., 1 Wall. 116.

II.

The United States Supreme Court may examine and decide for themselves whether the Constitution has been violated and is not concluded by construction put upon state statutes by State Courts or the rulings of State Courts by which the obligation of contracts is impaired or persons have been deprived of property without due process of law.

Bridge Propr. v. Hoboken Co., 1 Wall. 116.

C. B. & Q. Ry. v. Chicago, 166 U. S. 231, 233, 259.

This case comes under the second paragraph of the act relating to Writs of Error and it was not necessary to set up and claim specifically repugnancy to the United States Constitution, as in cases as to abridging "the privileges and immunities of citizens."

Water Power v. Street Ry. Co., 172 U. S. 488.

Though unnecessary, the repugnancy was specially set up and the case was contested on that ground through all the Courts. The decision of the Court of Appeals necessarily included a decision of the question adverse to the owner by whom the repugnancy was set up. (Page 17).

Nielson v. Lagow, 12 How. 98.

C. B. & Q. R. Co. v. Chicago, 166 U. S. 232.

In the case of C. B. & Q. Ry. v. Chicago (166 U. S. 233) it was said by Mr. Justice Harlan: "The prohibitions of the 14th Amendment extended to all acts of the State, whether through its legislative, its executive or its judicial authorities."

In the same case it was said by Mr. Justice Brewer, referring to the opinion by Mr. Justice Harlan (p. 259): "I agree to the proposition that a judgment of a state court, *even if it be authorized by statute*, whereby private property is taken for the state, or under its direction, for public use, *without compensation* made or secured to the owner, is, upon principle and authority wanting in the due process of law required by the 14th Amendment to the Constitution of the United States and the affirmance of such a judgment by the highest court of the state is a denial by that state of a right secured to the owner by that instrument."

The proceeding was a "suit" within the meaning of the act. R. S. Sec. 709.

In Weston v. City Council of Charleston (2 Peters 464) Chief Justice Marshall said: "The term is certainly a comprehensive one, and is understood to apply to any proceeding in a court of justice by which an individual pursues that remedy in a court of justice, which the law allows him."

The Court of Appeals without right determined the entire cause and rendered final judgment. (Page 130).

Matter of Gibson, 195 N. Y. 470.

Commissioners v. Lucas, 93 U. S. 113.

There was nothing left for the Court below except to enforce the judgment of the Court of Appeals.

Wilkins v. Earl, 46 N. Y. 358.

“If by any direction of a Supreme Court of a State an entire cause is determined, the decision when reduced to form and entered in the records of the Court, constitutes a final judgment, whatever may be its technical designation and is subject in a proper case to review by this Court.”

Commissioners v. Lucas, 93 U. S. 108.

The final determination in a special proceeding is reviewable as a judgment on a Writ of Error.

Boyd v. Nebraska, 143 U. S. 161.

Am. Ex. Co. v. Mich., 177 U. S. 407.

Hartman v. Greenhow, 102 U. S. 675.

Commissioners v. Lucas, 93 U. S. 113.

C. B. & Q. Ry. v. Chicago, 166 U. S. 226.

The final order, or decree, was enrolled. (Pages 11, 133). It has all the force and effect of a judgment.

N. Y. Code of Civil Procedure, Sec. 3373.

The Appellate Division is the highest court of the State having jurisdiction to review evidence and determine the facts. When it reverses in a case like this, which is a special proceeding, and there were no *issues* tried before a court or judge, and its order of reversal does not state the grounds of reversal, it is presumed to have found all the facts in favor of the prevailing party warranted by the evidence. Point XII, *Infra*. The evidence warranted a finding that the value of the property exceeded a quarter of a million of dollars. It is a legal presumption equivalent to an express finding. The finding by the Appellate Division was not reviewable by the Court of Appeals. That court was under obligation to accept as a fact in the case the presumed finding.

The Court of Appeals cannot deal with facts, which must be settled in the Supreme Court.

Tousey v. Hastings, 194 N. Y. 79.

“If it appears that there was any material and controverted question of fact the decision thereof by the Appellate Division is final.”

Otten v. Manhattan R. Co., 150 N. Y. 401.

The exception to the commissioners' report awarding six cents on the ground that it was less than just compensation and contrary to and in violation of the Constitu-

tion of the United States is sustained by the presumed finding by the Appellate Division, that the property was worth more than a quarter of a million of dollars. The decision of the Court of Appeals reversing the Appellate Division and rendering final judgment against the plaintiff in error necessarily included a determination that the award of six cents was not repugnant to the Constitution of the United States, though it was bound by the decision of the Appellate Division to presume that the value was greater, and was a final decision by the highest Court of the State against the rights of the plaintiff in error specially set up and claimed by him under such Constitution, and may be examined and reversed in the Supreme Court of the United States upon Writ of Error.

R. S. Sec. 709.

III.

Material requisites for due process of law were lacking in this proceeding.

For due process there must be an opportunity to be heard on *all* of the case before the tribunal that finally determines the proceeding; due compensation must be made or secured to the owner; and the officers proceeding to make the appropriation must keep within the authority conferred and observe the regulations made for the protection of the property owner.

2 Story Const. 1955.

C. B. & Q. R. R. Co. v. Chicago, 166 U. S. 233.

Stuart v. Palmer, 74 N. Y. 183.

IV.

An order granting a new trial or rehearing in a special proceeding is not an order finally determining the proceeding and is not appealable as of right.

Van Arsdale v. King, 155 N. Y. 325.

Matter of Gibson, 195 N. Y. 466.

People ex rel. L. A. E. & P. Co. v. Pub. S. Com.,
199 N. Y. 255.

City of J. v. Wade, 157 N. Y. 50.

Code Civ. Proc., Sec. 190.

N. Y. Const. Art. 6, Sec. 9.

In *Commercial Bank v. Sherwood* (162 N. Y. 310, 317) it is said: "The *permission to appeal*, under subdiv. 2, Sec. 191, in no way enlarges the jurisdiction of the Court with respect to the questions that may be reviewed by it upon a hearing of the appeal." Citing *Young v. Fox*, 155 N. Y. 615; *Grannan v. Westchester Assoc.*, 153 N. Y. 449.

Section 190 C. C. Pro. provides: * * "From and after the last day of December, 1895, the jurisdiction of the Court of Appeals shall, in civil actions and proceedings, be confined to the review upon appeal of the actual determinations made by the Appellate Division of the Supreme Court in either of the following cases, and no others:

"1. Appeals may be taken as of right to said court, from judgments or orders *finally* determining actions or special proceedings, and from orders granting new trials on exceptions where the appellants *stipulate* that upon affirmance, judgment absolute shall be rendered against them."

"2. Appeals may also be taken from determinations of the Appellate Division of the Supreme Court in any department where the Appellate Division allows the same, and certifies that one or more *questions of law have arisen* which, in its opinion ought to be reviewed by the Court of Appeals, in which case the appeal brings up for review the question or questions so certified, and *no other*; and the Court of Appeals shall certify to the Appellate Division its determination *upon such questions*."

"Sec. 191. The jurisdiction conferred by the last section is subject to the following limitations, exceptions and conditions:

1. No appeal shall be taken to said Court, in any civil action or proceeding commenced in any Court other than the Supreme Court, Court of Claims, County Court or a Surrogates Court, unless the Appellate Division of the Supreme Court allows the appeal by an order made at the term which rendered the determination, or at the next term after judgment is entered thereupon and shall certify that in its opinion *a question of law* is involved, which ought to be reviewed by the Court of Appeals."

These sections are construed in *Commercial Bank v. Sherwood*, 162 N. Y. 310, 316, 317, and *Young v. Fox*, 155 N. Y. 615, and the difference between an appeal by permission under Sec. 190, subd. 2 and an appeal by permission under

Sec. 191 is explained. In the latter case the appeal is general, bringing up all the questions of law there are in it, and questions for review need not be certified, (*Young v. Fox*, *supra*.) while in the former, under subd. 2, questions must be certified and the review is confined to the questions. (*Commercial Bank v. Sherwood*, 162 N. Y., 316, 317). A general appeal bringing up the *whole* case cannot be taken under either section from an order in a special proceeding that is not an order finally determining the proceeding.

Matter of Gibson, 195 N. Y. 466, 470.

V.

Certified Questions.

“Each question certified must be one of law and not of fact, nor of mixed law and fact, and it must be a distinct point or proposition clearly stated, and not the whole case, nor the question whether upon the evidence the judgment should be for one party or for the other.”

(*Mr. Justice Gray*, in *Williamsport Bk. v. Knapp*, 119 U. S. 357.)

Matter of Westerfield, 163 N. Y. 209.

Malone v. Sts. P. & P. Ch., 172 N. Y. 269.

United States v. U. P. R. R. Co., 168 U. S. 505, 512.

Graver v. Faurot, 162 U. S. 435.

Sigafus v. Porter, 85 Fed. 689.

Felsenheld v. U. S., 186 U. S. 126.

Jewell v. Knight, 123 U. S. 426, 432.

Cross v. Evans, 167 U. S. 60.

Sioux City O. & W. Ry., 172 U. S. 642.

Fire Ins. Assoc. v. Wickham, 128 U. S. 426, 432.

Columbus Watch Co. v. Robbins, 148 U. S. 266.

The order allowing the appeal recites that the form of the questions was objected to. (P. 123). The questions were claimed in the Court of Appeals to be such as were not answerable.

The questions certified do not come within the rule and were insufficient to confer jurisdiction.

Points XXVII, XXVIII and XXIX, *infra*.

In *Fire Ins. Assoc. v. Wickham* (128 U. S. 426, 434) the Court says: "The law is so clearly stated, and the cases are so fully cited by Mr. Justice Gray in the recent case of *Jewell v. Knight*, 123 U. S. 426, 432, that nothing further need be said. It is there laid down, 1st—that the questions certified 'must be a distinct *point* or proposition of law, *clearly stated*, so that it can be definitely answered without regard to *other issues* of law or fact in the case;' *secondly*, it must be 'a question of law only and not a question of fact, or of mixed law and fact;' hence it must *not involve nor imply a conclusion or judgment upon the weight or effect of testimony* or facts adduced in the case, as, for example, question of fraud, which is necessarily compounded of fact and of law; *thirdly*, it must not embrace 'the *whole case*, even when its decision turns upon matters of law only;' and even though it be *split up* into the form of questions."

See also *Mart v. Bryan*, 188 N. Y. 431

The rules governing the character of questions which may be certified under the New York Code are the same as those under the United States Judiciary Act.

Grannan v. Westchester Assoc., 153 N. Y. 449, 458-9.

The *Grannan* case cites *Jewell v. Knight*, 123 U. S. 426 and *Fire Ins. Assoc. v. Wickham*, 128 U. S. 426, above referred to and several other U. S. cases. The *Grannan* case is cited in *Caponigri v. Altieri*, 164 N. Y. 480 and in other cases.

The same rules as to certified questions apply in Iowa and Illinois.

Des Moines Ins. Co. v. Briley, 44 N. W. Rep. 715 (Ia.)

Hawkeye Ins. Co. v. Erlandson, 84 Iowa 193, 197.

Lamar Ins. Co. v. Gulick, 96 Ill. 619.

In *U. S. v. U. P. R. R. Co.*, (168 U. S. 513) the Court said: "To answer the questions certified would require us to consider the several matters thus pressed on our attention; to pass upon questions of law not specifically propounded and to dispose of the *whole case*. It follows

that the certificate is insufficient under the statute," and dismissed the certificate.

The decisions under the United States Statute apply equally well to the state statute, which restricts the review to certified questions of law. The state statute is quite as clear in its limitations as that of the United States.

If the questions certified are not distinct questions of law the Court has nothing which it can review or determine.

VI.

The first two questions ask for answers "under the facts" without giving the facts. The questions were not answerable because they involved questions not certified, and they should have been dismissed.

Matter of Westerfield, 163 N. Y. 209.

Malone v. Sts. P. & P. Ch., 172 N. Y. 269.

United States v. U. P. R. R. Co., 168 U. S. 505,
512.

Graver v. Faurot, 162 U. S. 435.

Sigafus v. Porter, 85 Fed. 689.

Felsenheld v. U. S., 186 U. S. 126.

Jewell v. Knight, 123 U. S. 426, 432.

Cross v. Evans, 167 U. S. 60.

Sioux City O. & W. Ry., 172 U. S. 642.

Fire Ins. Assoc. v. Wickham, 128 U. S. 426, 432.

Columbus Watch Co. v. Robbins, 148 U. S. 266.

If the questions require the Court to decide what the *facts* are from inferences drawn from evidence contained in the record they ask the Court for something not within its jurisdiction.

Dougherty v. Lion F. I. Co., 183 N. Y. 302.

By the State Constitution, its jurisdiction is limited to a review of questions of law. (Sec. 9, Art. 6).

If that difficulty were removed there would remain the presumption that the Appellate Division decided all facts warranted by the evidence in favor of the defendant who prevailed in that Court.

Upon the presumption that the Appellate Division decided the facts warranted by the evidence in favor of the

defendant, if we assume that the Court of Appeals may review the evidence so far as to decide what facts the evidence warranted the Appellate Division in finding, and the questions are based upon the facts which it is to be presumed the Appellate Division found, the questions would be in substance—— Is Charles E. Appleby, etc. entitled to an award of more than six cents damages on the City of Buffalo acquiring the fee to the lands under the waters of Buffalo River in eminent domain proceedings, taken pursuant to its revised City Charter for the purposes of a public highway; he being the owner and the lands being worth more than a quarter of a million of dollars?

The purpose for which the lands are taken is immaterial, and does not affect the right of the owner to payment of their value.

Matter of City of N. Y., 190 N. Y. 350.

Code C. P. Sec. 3370.

The Constitution of the United States forbids any State to deprive any person of property without due process of law, which requires compensation. Six cents is not compensation for property worth a quarter of a million of dollars. Compensate means to give equal value to, 8 Cyc. 401-2, Title "Compensation." "A full and fair equivalent."

The Court of Appeals erred in answering the question "No" and its decision was repugnant to the Federal Constitution.

The second question is the converse of the first and was erroneously answered "Yes."

The third question was not answered.

The fourth question does not state any distinct proposition of law. It is considered under Point LIII.

In *Cross v. Evans*, 167 U. S. 60, the first question was: "*Under the facts of the case as shown by the pleadings and hereinbefore recited was the M. K. & T. Ry. Co. of Texas properly made a co-defendant with the receivers Cross and Eddy?*"

Second question: "*Under the facts of the case, as shown by the pleadings and hereinbefore recited, had the Circuit Court * * jurisdiction and authority to try and determine the issues * * and give judgment accordingly?*"

The statement of facts contained a long statement of the various steps in the action, etc.

Certificate dismissed.

Cites and follows *Graver v. Faurot*, 162 U. S. 435.

It was held that the questions require a determination of the "whole case and all questions of law which may be *lurking in the record.*"

Cross v. Evans (167 U. S. 60) is followed in *Sioux City O. & W. Ry. v. Manhattan Trust Co.*, 172 U. S. 642, and *U. S. v. U. Pac. Ry.*, 168 U. S. 505.

VII.

The certification of questions to the Court of Appeals did not bring the proceeding or the order of reversal before the Court of Appeals and that court did not have power to review them. The proceeding was not removed to the Court of Appeals but remained undetermined in the court below.

Art. 6, Sec. 9 of the New York State Constitution has the following provision: "Except where the judgment is of death, appeals may be taken as of right to said Court *only* from judgments or orders entered upon decisions of the Appellate Division of the Supreme Court *finally determining* actions or special proceedings, and from orders granting new trials on exceptions, where *the appellants stipulate* that upon affirmance judgment absolute shall be rendered against him."

An appeal could not be taken under that provision.

Van Arsdale v. King, 155 N. Y. 325.

Matter of Gibson, 195 N. Y. 466.

Sec. 9 of Art. 6 of the Constitution further provides: "The Appellate Division may, however, allow an appeal upon any *question of law*, which, in its opinion, ought to be reviewed by the Court of Appeals." Subd. 2 of Sec. 190 of the Code of Civil Procedure provides that appeals may be taken " * * where the Appellate Division allows the same, and certifies that one or more *questions of law* have arisen, which, in its opinion ought to be reviewed by the Court of Appeals, in which case the appeal brings up for review the *question or questions* so certified, and *no other*; and the Court of Appeals shall certify to the Appellate Division its determination upon such questions"—not its *judgment* upon the case in favor of one party or the other.

An appeal from an order granting a new trial or rehearing in a special proceeding cannot be taken under those provisions.

Van Arsdale v. King, 155 N. Y. 325.

Matter of Gibson, 195 N. Y. 466.

People ex rel. L. A. etc. & P. Co. v. P. S. Com.,
199 N. Y. 255.

City of J. v. Wade, 157 N. Y. 50.

In the cases where questions may be certified for review, the *whole* cause is not brought up but remains for further proceedings and final determination in the Court below. The questions are sent to the Court of Appeals to obtain its decision upon them and its determination upon the questions is required to be certified to the Appellate Division to aid them *in the ultimate decision of the cause*.

Commercial Bank v. Sherwood, 162 N. Y. 316-317.

A definition of the word "appeal" as given by Webster is "to refer to another for the decision of a question controverted." That is all it means as used in the provisions above cited, as they expressly state that the questions certified are *brought up* for review, and *no other*.

The decision of questions certified under the provisions above mentioned serves the same purpose as the decision by this Court of questions of law certified to it by the Circuit Court of Appeals.

VIII.

The land owner was deprived by this proceeding of property without an opportunity to be heard upon all of the case. An opportunity to be heard on the whole case was requisite for due process of law. A hearing upon something ~~is~~ less^{is} insufficient.

He was deprived of the results and benefits of the hearings in the Courts below and did not have an opportunity to be heard in the Court of Appeals on anything but the certified questions. That judgment of the Court of Appeals which finally determined the proceedings was rendered without a hearing on the whole case and conflicted with the 14th amendment.

C. B. & Q. R. Co. v. Chicago, 166 U. S. 234.

The appeal to the Court of Appeals did not bring up the *whole* case. Only the questions certified were brought up. They were selected without the land owner's consent and did not cover the most material grounds upon which he was entitled to the re-hearing granted by the Appellate Division. (Opinion 122). There were questions of fact and matters of discretion upon which he properly prevailed in the Appellate Division, which should have prevented reversal by the Court of Appeals, but he did not have an opportunity to be heard on them.

Bank of China v. Morse, 168 N. Y. 483.

Caswell v. Hazard, 121 N. Y. 491.

Gray v. Board of Supervisors, 93 N. Y. 608.

Cobb v. Hatfield, 46 N. Y. 533, 538.

Lake v. Nathan, 67 N. Y. 589.

Code Civ. Proc. Secs. 3375, 3377.

If the whole case had been brought up by a general appeal it must have been dismissed because it involved questions of fact and matters of discretion which the Court of Appeals could not review.

Caponigri v. Altieri, 164 N. Y. 480.

People ex rel. Drake v. Andrews, 196 N. Y. 538.

Its jurisdiction could not be enlarged by certifying questions not otherwise reviewable.

City Trust Co. v. Am. B. Co., 182 N. Y. 291.

The Appellate Division "and Special Terms of the Supreme Court are but different parts of the same court of equal original jurisdiction, and the former can review and correct orders made by the latter whether discretionary or not, provided they affect matters of substance."

Martin v. Windsor Hotel Co., 70 N. Y. 103.

Maier v. Duffin, 134 App. Div., (N. Y.) 594.

Pietraroia v. N. J. & H. R. R. Co., 197 N. Y. 437.

Finn v. Scottish Etc. Co., 137 N. Y. App. Div., 60.

The Appellate Division may review the facts. The Court of Appeals is not permitted to do so.

IX.

Were the Court of Appeals authorized by statute to render final judgment on the whole case without having the whole case before it, the statute would be unconstitutional. As the Court of Appeals did not have statutory or other authority to render final judgment, its judgment was unconstitutional.

X.

In *Snebley v. Conner*, 78 N. Y. 219, the Court said: "It is incumbent upon the appellant, in order to sustain his appeal, to show affirmatively that some error was committed at the General Term which this Court can correct. The facts were before the General Term and it had the power to grant a new trial upon the facts and it may have done so. We cannot say that it did not. (*Wright v. Hunter*, 46 N. Y., 409; *Sands v. Crooke*, 46 id., 564; *Dickson v. Broadway etc. R. R.*, 47 id., 507; *Downing v. Kelly*, 48 id., 433; *Harris v. Burdett*, 73 id., 136)."

Caponigri v. Altieri, 164 N. Y. 480.

People ex rel. Drake v. Andrews, 196 N. Y. 538.

Dougherty v. Lion Fire Ins. Co., 183 N. Y. 302.

XI.

The order of the Appellate Division is presumed to have been made, and was made, on the facts, and in its discretion as well as on questions of law, including the constitutional provision, and was not reviewable. Point XII, *Infra*.

The Appellate Division may find facts from the evidence.

The State Constitution contains this provision, Art. 6, Sec. 9: "The jurisdiction of the Court of Appeals, except where the judgment is of death, shall be limited to the review of questions of *law*."

The order was *silent* as to the grounds of reversal and

if it might have been made on the *facts*, the presumption is that it was so made, and was not appealable.

Snebley v. Conner, 78 N. Y. 219.

People ex rel. Drake v. Andrews, 196 N. Y. 538.

In Mickee v. W. M. & R. M. Co., 144 N. Y., 613, the order of reversal by the General Term stated that "the reversal was for errors of law only, not for errors of fact" and the Court of Appeals held that the order was not reviewable as it did not show that the Court had *considered* the facts, and dismissed the appeal.

In the Matter of Kings Co. E. Ry. Co., (82 N. Y., 98) the Court said: "The order appealed from is *silent* as to the ground upon which it was made, whether of law or fact. In such case, we are bound to suppose that the General Term examined the case before it upon the matters of fact involved, as well as upon the questions of law presented, and based the order made upon conclusions drawn from the former, as well as the latter." Appeal dismissed.

In Chapman v. Comstock, 134 N. Y., 509, the Court of Appeals said: "When there was a conflict of evidence and the order may have been made upon the facts, it is not reviewable in this Court unless it appears from the record that the order was *affirmed as to the facts*, or the appeal therefrom dismissed." Appeal dismissed.

In Albring v. N. Y. C. & H. R. R. Co., 166 N. Y. 287, the Court held that an order of the Appellate Division, reversing a judgment entered upon a verdict solely upon specified questions of law and granting a new trial, which recited that the Court examined the questions of fact as to the other issues in the case and found no error therein, but failed to show that the questions of fact as to the issues specified were examined and the verdict thereon approved was not appealable to the Court of Appeals, and that the defendant was *entitled to have the questions of fact reviewed* and passed on by the Appellate Division not only as to the other issues in the case, but also as to those disposed of as matters of law.

In Bank of China v. Morse, 168 N. Y. 471, the Court said: "This Court has frequently and uniformly held that an order granting a new trial in an action tried by a jury, where there is a conflict in the evidence and the order may have been upon the facts, is not reviewable in this Court

unless it appears from the record that the order was affirmed as to the facts, or the appeal therefrom dismissed.

In *Pringle v. Long Island R. R. Co.*, 157 N. Y. 100, a motion was made to revive an action after the death of a party, and affidavits were read in behalf of the defendant tending to show *laches* on the part of the plaintiff, and affidavits were read in behalf of the plaintiff tending to excuse such *laches*. The Special Term denied the motion, as appears from the opinion of the justice presiding, on the ground of "laches in making it." Upon appeal, the Appellate Division reversed the order and granted the motion without specifying any reason or ground in its order, but, in its opinion, stating that *laches* is no answer to such a motion. An appeal was allowed to the Court of Appeals and the following question certified: "Is *laches*, on the part of the plaintiff, an answer to a motion for a revivor in an action for damages brought against a defendant by reason of alleged negligence?"

The Court answered the question in the affirmative and said in the opinion that the Court did not consider the question of fact presented by the conflicting affidavits; and remitted the case to the Appellate Division for *further consideration*.

The Court said in its opinion: "*The ordinary presumption, in support of the order appealed from, would be that the Court decided the question of fact in favor of the prevailing party. This appeal, however, is certified to us, and our jurisdiction to review depends upon the order of certification, which expressly refers to the opinion of the Appellate Division rendered in deciding the appeal from the Special Term. Under these circumstances, we think the opinion becomes a part of the record before us, and hence it appears that the action of the Court was based upon the case of Holsman v. St. John and that the Court did not consider the question of fact presented by the conflicting affidavits read upon the motion. The defendant, therefore, although entitled to a review of the question of fact, has not yet had the benefit of its consideration by that learned Court.*"

The Court of Appeals can only review the questions certified. There was no question certified asking if there was sufficient evidence to sustain a finding by the Appellate

Division that the value of the property was more than nominal, or any statement in the certified questions showing its findings of fact upon the evidence. That was a fact in the case assumed by the Appellate Division to be established, when it asked respecting the amount of the award to which Mr. Appleby was entitled under the facts of this proceeding, the presumption being that it found all the facts warranted by the evidence in favor of the party prevailing in that Court.

If the opinion in the case now presented to this Court is, by certifying the questions or by Rule 8 of this Court, made a part of the record, it shows that the facts were decided in the land-owner's favor, as it states that the evidence conclusively shows that the value of the property is more than nominal (Page 122) and the question should be deemed to be based on the facts thus found, as well as the law. It certainly does not show that the facts had been decided by the Appellate Division in the City's favor, and if not decided in favor of the land-owner they had not been decided at all. The appeal should have been dismissed in accordance with the general rule, or, as in the Pringle case, *remitted* to the Appellate Division for further consideration. There is no view that can be taken of that case that sustains the decision of the Court of Appeals in this one.

Upon the presumption that the facts were decided by the Appellate Division in favor of the party prevailing in that Court, the Court must have found that the value of the property was more than nominal. Upon that fact it followed as matter of law under the Federal Constitution, the protection of which the owner claimed, that he was entitled to more than the nominal award, and the order of the Appellate Division granting a new appraisal was correct and should not have been reversed by the Court of Appeals. Upon that fact it followed that the exception to the report on the ground of repugnance to the Constitution of the United States was well taken and the decision of the Court of Appeals affirming the order of confirmation erroneously decided the constitutional question against the plaintiff in error.

Neilson v. Lagow, 12 How., 98.

In *Hewlett v. Wood*, 67 N. Y. 394, it was held: "Where an order denying a motion involving a question of *discretion* states that it is denied solely upon the ground of want of power * * * if it is here determined that the Court below erred in its decision as to want of power, the order will be reversed and the proceedings remitted to the Court below for the exercise of its discretion." Until exercise of the discretion, it was not proper to render a final judgment against the party in whose favor it might be exercised.

There was no construction that could be placed upon the order of reversal by the Appellate Division, the opinion, the order certifying questions or the questions themselves in this case, which would justify a reversal or final judgment by the Court of Appeals against the land-owner, Mr. Appleby. The order of reversal by the Appellate Division does not show that the reversal was not on questions of fact as well as of law. The opinion states that "We think it cannot be reasonably contended that the ownership of the fee of the bottom of the Buffalo River * * * is not as to the owner a valuable property. * * * We think the citation of authorities is unnecessary to demonstrate that the appellant was the owner of valuable property. * * * The evidence shows conclusively that such property is valuable * * * that it is more than nominal is *conclusively established*." The opinion does not show that the reversal was not on questions of fact. The question certified, "Is Charles E. Appleby, etc. under the *facts* in this proceeding entitled to an award of more than six cents damages, etc." does not imply that the reversal was not upon the facts. The opinion states as a fact that it was conclusively established that the value was more than nominal and that is one of the "facts" on which the question was based. There was evidence tending to show that the value was more than nominal and that must be deemed to be a *fact* upon which the question affecting the amount of the award to which the owner was entitled was based. *The question to be one of law must include that as an established fact.* If there was conflicting evidence, the questions of fact must be settled by the Appellate Division. The Court of Appeals cannot deal with them.

Touney v. Hastings, 194 N. Y. 82.

The People ex rel. Drake, 196 N. Y. 538.

Dougherty v. Lion Fire Ins. Co., 183 N. Y. 302.

If the question is not based upon the assumption that the evidence had been reviewed and the order made on a finding of all the facts in favor of the owner which were warranted by the evidence, or if it is intended to ask the Court of Appeals to decide the questions of fact on the evidence in the record, it is not one that can be answered, (*Dougherty v. Lion Fire Ins. Co.*, 183 N. Y., 302) and the certificate and appeal should have been dismissed, (*Matter of Westerfield*, 163 N. Y. 210; *Mickee v. W. M. & R. M. Co.*, 144 N. Y., 613) or the case should have been remitted to the Appellate Division for a review and decision upon the facts.

Pringle v. L. I. R. R. Co., 157 N. Y. 100.

Hewlett v. Wood, 67 N. Y. 394.

Matter of City of Buffalo, 68 N. Y. 170.

Spies v. Lockwood, 165 N. Y. 481, 484.

The questions of law that may be certified for review must be based on *fundamental facts, not evidential facts.*

Sigafus v. Porter, 85 Fed. R., 684.

If the question had been answerable the answer given was erroneous upon the evidence.

By the Constitution and the Code the jurisdiction of the Court of Appeals was limited to a review of questions of *law*. It could not review the decision of the Appellate Division on the evidence. If that tended to show that the value was more than six cents, it must be assumed that the Appellate Division so found and the question of law was whether the owner of property worth more than six cents was entitled to an award of more than that sum. There is no doubt as to that proposition and the answer and decision by the Court of Appeals against the owner was erroneous. By its decision, affirming the order of the Special Term, the Court of Appeals erroneously decided the exception to the report on the ground of repugnancy to the Constitution against the plaintiff in error. The affirmance of the order of confirmation necessarily included that.

XII.

If the order of reversal by the Appellate Division might have been made on questions of fact, or in the discretion of the Court, it was not reviewable.

If the case had come before the Court of Appeals in such a way that it was authorized to dispose of the whole matter and render final judgment (We deny that it did) that Court would have been bound to presume that the Appellate Division based the decision upon the facts as well as the law because the *order was silent* as to the grounds of reversal and the decision was not reviewable unless there was no view of the facts and the evidence that would justify the decision or the exercise of discretion.

People ex rel. Drake v. Andrews, 196 N. Y. 538.

Caponigri v. Altieri, 164 N. Y. 476, 480.

Att'y General v. Continental L. I. Co., 93 N. Y. 45.

Harris v. Burdett, 73 N. Y. 136.

Chapman v. Comstock, 134 N. Y. 509.

Mickee v. W. M. & R. M. Co., 144 N. Y. 613.

Hoes v. Edison G. E. Co., 150 N. Y. 87, 89.

Brennan v. City of N. Y., 123 App. Div. R. (N. Y.) 7.

Schneider v. City of Rochester, 155 N. Y. 619.

Matter of N. Y. W. S. & B. R. Co., 94 N. Y. 287, 291.

Matter of Kings Co. E. R. Co., 82 N. Y. 95.

Matter of N. Y. C. & H. R. R. Co., 64 N. Y. 60.

Matter of S. B. R. R. Co., 128 N. Y. 93.

Allen v. Meyer, 73 N. Y. 1.

Matter of N. Y. & H. R. R. Co., 98 N. Y. 12.

Martin v. Windsor Hotel Co., 70 N. Y. 101.

Lewin v. Lehigh V. R. Co., 169 N. Y. 336.

Dickson v. Broadway, etc., 47 N. Y. 507.

Wright v. Hunter, 46 N. Y. 409.

Sands v. Crooke, 46 N. Y. 564.

Young v. Davis, 30 N. Y. 134.

Bassett v. French, 155 N. Y. 46.

Bossout v. R. W. & O. R. R., 131 N. Y. 37.

Sandford, Admr. v. Eighth Ave. R. Co., 23 N. Y. 343.

Brooks v. Mex. Nat. Con. Co., 93 N. Y. 647.

People ex rel. Putnam v. Palmer, etc., 197 N. Y. 524.

Gross v. Kathiro Chemical Co., 195 N. Y. 535.

Scott v. Int. Paper Co., 195 N. Y. 603.

Fisher v. Gould, 81 N. Y. 228.

Matter of Townsend, 81 N. Y. 644.

Matter of Attorney General, 155 N. Y. 445.

Bank of China v. Morse, 168 N. Y. 471.

The plaintiff in error appealed from the order denying the motion to set aside the order of confirmataion as well as from the order of confirmation (p. 2).

When the order is discretionary it will be *presumed* that the court exercised *its* discretion in granting or refusing it, unless the *contrary* appears in the order. A discretionary order is *not reviewable* by the Court of Appeals.

People ex rel. v. Coler, 168 N. Y. 6.

Brooks v. Mex. Nat. Con. Co., 93 N. Y. 647.

Winter v. Eckert, 93 N. Y. 367.

Fisher v. Gould, 81 N. Y. 228.

Leonard v. Mulry, 93 N. Y. 392.

Matter of Curtiss, 199 N. Y. 36

Code Civ. Pro. Sec. 3377.

Matter of Attorney General, 155 N. Y. 445.

Jenkins v. Putnam, 106 N. Y. 272.

People ex rel. Drake v. Andrews, 196 N. Y. 538.

The only exception to the rules above stated is the one created by Sec. 1338 of the Code, and that is not applicable to the case.

C. C. P. 1338, 1361.

Code of Civil Procedure Sections 1338 and 1361, upon which the Court of Appeals based its decision, and assumed jurisdiction to answer the questions, were not applicable to the case. Sec. 1338 applies only to actions tried by a Referee or the Court without a jury, where findings of fact and conclusions of law are required. Sec. 1361 applies only to the Appellate Division.

Henavie v. N. Y. C. & H. R. R. Co., 154 N. Y. 278.

Matter So. Boul. R. R. Co., 128 N. Y. 93, 98.

Schryer v. Fenton, 162 N. Y. 444.

Goodwin v. Conklin, 85 N. Y. 21, 25.

Sands v. Crooke, 46 N. Y. 568.

In Henavie v. N. Y. C. & H. R. R. Co., (154 N. Y., 278) the Court said: "If it was the intention of the Legislature to place all appeals upon the same footing, so far as the

section relating to presumptions is concerned, there was no necessity of specifying the different kinds of judgments by referring to what they were entered upon. If all were to be included, both clearness and brevity would have been promoted by saying so and omitting the enumeration as superfluous."

C. C. P. Sec. 1338 provides: "Upon an appeal to the Court of Appeals from a *judgment* reversing a *judgment* entered upon the report of a referee, or a determination in a *Trial Court*; or from an order granting a new trial upon *such a reversal* (Reversal of such a "judgment"); it must be presumed that the judgment was not reversed, or the new trial granted upon a question of fact, unless the contrary clearly appears in the record body of the judgment, or order appealed from."

"*Expressio unius est exclusio alterius.*"

Norton v. Horton, 189 N. Y. 398, 400.

The meaning of the word "judgment" as used in the Code is defined in Sec. 3343, subd. 20, as follows: "The word 'action' refers to a civil action; the word 'judgment' to a judgment in such an action."

This is a statutory proceeding and therefore a "special proceeding." Code Sec. 3334.

An order reversing an order in a special proceeding is not "a judgment reversing a judgment," as the word "judgment" is used in the Code (Sec. 1338), and is not an order granting a new trial on a reversal of a judgment (Matter of Gibson, 195 N. Y. 469) and *is not within the terms of Sec. 1338 and is not affected by it.*

There can be no "judgment" in a special proceeding, according to the technical definition of it in the Code, Sec. 3343, subd. 20. A special proceeding is terminated by an "order" or "decree" and not by a "judgment" eo nomine, as the words are technically used in the Code.

Matter of Gibson, 195 N. Y. 466, 469.

The appraisers were not referees. If they had been their report must have contained findings of fact and conclusions of law (Code C. P. Sec. 1022) and directed the judgment to be entered. The order reversed was not "a judgment entered on the report of a referee." The report of referees upon trial of issues stands as the decision of the Court and does not require confirmation. (Code C. P. Sec. 1228).

A motion to confirm the report of appraisal commissioners is not a "trial," and the order made on the motion at Special Term is not a judgment entered on a determination in a "Trial Court," which requires a written decision of the judge stating separately the facts found and the conclusions of law and directing the judgment to be entered thereon. (Code C. P. Secs. 1022, 1228).

"An application for an order is a motion." (Code Sec. 768.)

The general rule in respect to presumptions and not the exception under Sec. 1338 applies.

It was said long ago in the case of *Sands v. Crooke*, 46 N. Y. 568, that the sections which provide that a judgment shall not be deemed to have been reversed on questions of fact, unless so stated in the order of reversal, apply only to cases *tried* by the Court or a Referee. The numbers and phraseology of the sections have since been changed but the limitation remains the same.

Henavie v. N. Y. C. & H. R. R. Co., 154 N. Y. 278.

Schryer v. Fenton, 162 N. Y. 445.

Goodwin v. Conklin, 85 N. Y. 21, 25.

Sec. 1361 (through which the Court of Appeals tries to apply 1338) provides that * * * The proceedings upon an appeal, taken as prescribed *in this title*, are governed by the provisions of this act, and of the general rules of practice relating to an appeal in an action. * * * That section does not relate to proceedings either in the Court below or the Court above the Appellate Division. It affects only the proceedings *in the Appellate Division*. It is part of Title 5, which relates to appeals *to* the Appellate Division. Appeals "taken as prescribed in this title" are appeals *to* the Appellate Division and the section *does not apply to appeals to the Court of Appeals*. (Matter of *S. B. R. R. Co.*, 128 N. Y., 93, 98; Mr. Justice Peckham writing the opinion.) There is no such provision in Title 2, which relates to appeals to the Court of Appeals, nor in Title 1, which contains provisions relating to appeals generally. The case just mentioned (128 N. Y., 93) was decided in 1891. Sec. 1361 reads exactly as it did when it was adopted in 1877. Sec. 1338 does not apply to anything but an appeal to the Court of Appeals from *a judgment reversing a judgment in an action entered upon the report*

of a referee or a determination in a Trial Court or from an order granting a new trial upon such a reversal, i. e., reversal of a judgment in an *action*. An appraisal by commissioners is not a trial. They are not a trial Court. Point XVI. Their functions are limited to assessing damages (187 N. Y., 305) and an order directing a new appraisal before commissioners to be appointed by the Special Term is not an order granting a new trial; *Manhattan R. Co. v. Kent*, 80 Hun 559; *aff'd.* 145 N. Y., 595; *Bassett v. French*, 155 N. Y. 46; *Bossout v. R. W. & O. R. R. Co.*, 131 N. Y., 37) nor an order granting a new trial on reversal of a judgment entered on the report of a referee or a determination in a Trial Court. Sec. 1338 would not apply to an appeal like this were the rules relating to actions and special proceedings the same. *It would not apply to an order in an action directing a reassessment of damages.*

Stipulations for judgment absolute in case of affirmance must be given if the appeal is from an order granting a new trial. (Code C. P. Sec. 190, subd. 1.) That is the only order mentioned in Sec. 1338. The Code distinguished actions from *special proceedings* by permitting appeals from orders granting new trials in actions but not in special proceedings (Sec. 190 and *Matter of Gibson*, 195 N. Y., 466), thus preventing the application of Sections 1361 and 1338 to appeals from orders granting new trials in *special proceedings* by not allowing such appeals.

VanArsdale v. King, 155 N. Y. 325.

In *Dickson v. Broadway etc. R. R. Co.*, 47 N. Y. 507, it was held: "Where the Court below *may have* granted a new trial upon *questions of fact*, the decision is not reviewable in this Court. It is only in actions tried by the Court or referee, that the order granting a new trial can declare the grounds upon which the new trial was granted and whether granted upon questions of law alone or upon questions of fact as such."

At p. 511 the Court said: "The learned judges inadvertently failed to distinguish between appeals from orders granting new trials in actions tried by a jury and in those tried by the Court or a referee."

It may be added that in this case the learned judges failed to distinguish between orders granting new trials in actions tried by the Court or referee, and cases where

there had not been a trial before the Court or a referee, or a reversal of a judgment entered upon a report of a referee or determination in a Trial Court, and failed to consider that only special *questions* of law were up for review and the *whole* cause had not been sent up.

The Court did not notice the limitations of Secs. 1338 and 1361 or it is not probable that it would have cited them to support the proposition "that the reversal by the Appellate Division must be deemed to have been made as a matter of law," and doubtless overlooked the case in 128 N. Y. 93. They must also have overlooked the provisions of Sec. 190, or they would have dismissed the appeal, as they did in the Gibson case (195 N. Y. 466).

Were the order to be construed as an order granting a new trial on exceptions, which is the only *order* Sec. 1338 refers to, the Court of Appeals did not acquire jurisdiction by the order granting permission to appeal and certifying questions without a stipulation for judgment absolute which was not given.

N. Y. C. & H. R. R. Co., v. State of N. Y. 166 N. Y. 286.

Mundt v. Glokner, 160 N. Y. 371.

Sec. 1338 is entirely inappropriate for a case where nothing but certified questions of law are brought up for review. They must be questions of law on *ascertained facts*, which must appear in the questions and must not ask whether the judgment should be in favor of one party or the other, and cannot cover the whole case though split up in the form of questions. Point V, XXVIII.

The Court seems not to have noticed that Sec. 1338 does not apply to a case where there has not been a reversal of a judgment entered on a determination of a *Trial* Court, or that Secs. 969, 1022 and 1228 of the Code copied below require a trial of issues before a judge at a trial term and a written decision finding facts and conclusions of law and directing the judgment to be entered before there is "a determination in a Trial Court" authorizing entry of judgment.

It is not every reversal of a judgment to which Sec. 1338 applies. The judgment must have been entered on a report of a referee or a determination in a Trial Court.

Sands v. Crooke, 46 N. Y. 568.

Henavie v. N. Y. C. & H. R. R. Co., 154 N. Y. 278.

Dickson v. B. & S. R. R. Co., 47 N. Y. 507.

The only appeal from an *order* mentioned in the Section is from an order granting a *new* trial. By that expression it is to be inferred that there has been a trial, and that the "determination in the Trial Court" on which the judgment was entered, referred to in the section, was the result of a previous trial in the Trial Court.

Sec. 963 of the Code is as follows: "The *issues* which are treated of in this chapter are only those which are presented by the *pleadings*. An issue arises where a fact, or a conclusion of law, is maintained by one party and controverted by the other."

"Sec. 964. An issue of law arises only upon a demurrer." For an issue of fact, there must be an answer to a complaint. *Id.*

Sec. 520. Pleadings must be subscribed and served, implying that they must be written. There was no answer in this case, consequently there were no issues. There was no complaint or petition and nothing to answer. There was nothing to indicate that there was to be a question of title when the commissioners were appointed, or at any time before progress had been made in the hearing before the commissioners.

"Sec. 965. *ISSUES TO BE JUDICIALLY EXAMINED BY A TRIAL.* An issue either of law or of fact must be tried as prescribed by this chapter, unless it is disposed of as prescribed in Chapter sixth of this act." (as sham, frivolous, etc.)

"Sec. 969. An issue of law in any action and an issue of fact in an action not specified in the last section" (such as one triable by jury) "or wherever provision for a trial by jury is not expressly made by law, must be tried by the Court, unless a reference or a jury trial is directed."

"Sec. 1022. The decision of the Court or the report of a referee upon the trial of the whole issues of fact must *state separately the facts found* and the conclusions of law, and *direct the judgment to be entered thereon.* * * *"

"Sec. 1228. Where the whole issue is an issue of fact, which was tried by a referee, the report stands as a decision of the court. Except where it is otherwise expressly prescribed by law, judgment upon such a report, or upon the decision of the court, upon the trial of the whole issue of fact without a jury, may be entered by the clerk, as *directed therein*, upon filing the decision or report."

There must be a decision finding facts, which must support the conclusions of law or the judgment will be reversed. A report of evidence is not a substitute for a report of the facts found.

Raymond v. Security T. & I. Co., 111 N. Y. App. Div. 191.

Newman v. Mayer, 52 N. Y. App. Div., 209.

Dougherty v. Lion F. Ins. Co., 183 N. Y. 302.

"Sec. 1338. Upon an appeal to the Court of Appeals from a judgment reversing a judgment entered upon the report of a referee or a determination in the Trial Court, or from an order granting a new trial, upon such a reversal, it must be presumed that the judgment was not reversed, or the new trial granted, upon a question of fact, unless the contrary clearly appears in the record body of the judgment or order appealed from."

The connection between the sections cited is obvious. *Noscitur a sociis*.

The word "judgment" refers only to a judgment in an action.

Van Arsdale v. King, 155 N. Y. 325.

The reversal must, therefore, be a reversal of a judgment in an action, entered on a determination (decision) in a Trial Court, or Sec. 1338 will not apply.

The right to review an order which reverses a judgment in an action and grants a new trial does not extend to an order reversing a decree of a Surrogate's Court and directing a new hearing, it being an order in a special proceeding.

Matter of Gibson, 195 N. Y. 466.

The Court has decided many times that Sec. 1338 applies only where there has been a trial before a referee, or Trial Court held by a judge without a jury, and the judgment was entered on the report or decision of the referee or judge.

Sands v. Crooke, 46 N. Y. 568.

Henavie v. N. Y. C. & H. R. R. Co., 154 N. Y. 278.

Schryer v. Fenton, 162 N. Y. 444.

Allen v. Corn Exchange Bank, 181 N. Y. 278.

Brennan v. City of N. Y., 123 N. Y. App. Div., 7.

The application for an order confirming the report of appraisal commissioners was a motion, (Code Sec. 768), made on affidavits, notice of motion and papers therein

referred to (page 17-19). It was not a trial in a Trial Court; no testimony was taken before the Court; the order made on the motion was not the result of a trial of issues before the Court, and there was no decision finding facts and conclusions of law with a direction for judgment by a Trial Court within the meaning of Sec. 1338, *Supra*.

Sec. 1338 would not apply to such an order were the proceedings in special proceedings the same as in actions.

If the report of the Commissioners could be regarded as the report of referees on trial of issues, (it clearly cannot be) there were no findings of fact to support conclusions of law or direction of judgment and it should have been reversed.

Nat. Pro. Ass'n. v. Cumming, 170 N. Y. 320.

Dougherty v. Lion Fire Ins. Co., 183 N. Y. 302.

Where the order of reversal of a "judgment entered upon the report of a referee or determination in a Trial Court" grants a *new* trial, it implies that a trial has preceded it before a referee or Trial Court. In this proceeding there was no trial either before a Court or referee. An appraisal or assessment of damages before commissioners is not a trial (Bassett v. French, 155 N. Y., 46; 80 Hun, 559; aff'd. 145 N. Y. 595) and the order of confirmation made at Special Term on a motion was not a determination in a Trial Court.

The order of the Appellate Division directing a rehearing before appraisal commissioners was not within the terms of Sec. 1338. The functions of the commission were to appraise the value of the property and assess damages. They were not a court for the trial of issues. Point XVI, *Infra*.

The section is only appropriate where a general appeal bringing up the *whole* case can be taken and does not apply where the order granting a re-hearing of something other than a trial is not appealable but the Court certifies that one or more questions of law have arisen, which, in its opinion, ought to be reviewed by the Court of Appeals and the questions certified are brought up for review, and no other. The review does not include consideration of grounds of decision by the Appellate Division not stated in the questions. The questions of law which may be certified must also contain a statement of the facts on which they are based, and cannot be based on inferences to be

drawn from evidential facts. It is only the questions which ought to be reviewed that may be certified.

Matter of Westerfield, 163 N. Y. 209.

Points V *supra* and XXXIII *infra*.

That Sec. 1338 was not applicable to the appeal is also shown by comparing the provisions of C. C. P. 190, subd. 2, which provides that the questions certified, *and no others*, may be answered, with the decision in Nat. Harrow Co. v. Bement, 163 N. Y. 505, where it was held that under Sec. 1338 the Court of Appeals could consider 3 questions of law, viz.:

“1. Whether a material error was committed in receiving or rejecting evidence.

2. Whether the conclusion of law is supported by the facts found.

3. Whether any material finding of fact is without any evidence to support it.”

Under Sec. 190 they may consider *any* question of law duly certified.

None of the questions mentioned in the Bement case could have been decided in our case for the reason that there were no findings of fact and conclusions of law, and *no questions were certified* as to any of the questions mentioned in the Bement case.

Interpreted as it was Sec. 1338 is a falsifier of the truth and a cloak for injustice. Why should the Appellate Division write a long opinion giving its reasons for a decision and then have it rendered of no account by a false presumption and one contrary to the general rule?

XIII.

There was not due process of law in this proceeding.

Due compensation was not made and the parties and officers proceeding to make the appropriation did not keep within the authority conferred or observe the regulations made for the protection or in the interest of the property owner, and the 14th Amendment to the Constitution of the United States was violated. (2 Story Const. Sec. 1956.) Assignment of Errors, specif. I, p. 136; specif. II, p. 136; specif. III, p. 140; specif. IV, p. 141; specif. V, p. 142;

specif. VII, p. 146; specif. VIII, p. 147; IX, p. 147; X, p. 147; XI, p. 147; XII, p. 148; XIV, p. 151; XV, p. 151; XVI, p. 151; XVIII, p. 151; XIX, p. 151; XX, p. 152.

The errors pointed out in the specifications above referred to are further considered in subsequent points.

The proceeding purports to take the property in fee and a proprietary title which would not revert to the owner. The city is under no obligation to continue the use for which the property is taken, and the owner is entitled to the full value of the land taken in money alone, without deduction for supposed benefits.

Matter of City of N. Y., 190 N. Y., 350.

Matter of City of N. Y., 64 Misc. R. (N. Y.), 268.

Laws of N. Y. 1901, Ch. 199, (Exchange of lands).

Laws of N. Y., 1891, Ch. 105, Secs. 440, 441, (Sale of lands).

Code C. P. Sec. 3370.

Seton v. N. Y. City, 130 N. Y., App. Div., 148, 155.

Heyward v. Mayor, 7 N. Y., 325.

In Seton v. Mayor (130 N. Y. App. Div., 148, 155) it is said: "When the City takes property in fee simple, it must pay for such title."

XIV.

The plaintiff in error, Charles E. Appleby, as surviving trustee of the Ogden Land Company, was entitled to an award of more than six cents and the commissioners were not authorized to fix his damages at that sum.

The proceeding takes the land in fee simple, which includes every interest; he was the owner, the case states that as a fact (p. 37); it was duly proved by competent evidence (pp. 45, 117, 118); and the City by instituting the proceedings was estopped from disputing the title. Point XVI *infra*.

The owner was entitled to the full value of the land taken (*Matter of City of N. Y.*, 190 N. Y., 350; *Henderson v. N. Y. C. R. R. Co.*, 78 N. Y., 432) and compensation for depreciation in value of his adjoining land. (*Matter of Utica etc. R. R. Co.*, 56 Barb. (N. Y.) 456; *South Buffalo Ry. Co. v. Kirkover*, 176 N. Y., 301).

"The evidence shows conclusively that such property is valuable; that it is more than nominal is conclusively established." The Appellate Division said that in their opinion when they granted a new appraisal. It was proved by facts established by uncontradicted evidence that the value of the property was more than \$200,000. It must be presumed that the Appellate Division so found. Points XI and XII, *supra*.

Facts proved by unimpeached and uncontradicted witnesses are established as matter of law. Upon the facts thus established the Appellate Division was right in saying that "the evidence shows conclusively that such property is valuable." (Record 122.)

Just compensation should at least be sufficient to cover expenses and costs.

"Where property is taken by eminent domain, the spirit of the Constitution requires that the owner shall be paid not only the value of the property, but all necessary expenses incurred by him in fixing that value."

Matter City N. Y., 125 N. Y. App. Div., 219.

(Town of Hempstead) aff'd 192 N. Y., 569.

Burchard v. State of N. Y., 128 N. Y., App. Div., 750.

(Appeal dismissed, 195 N. Y., 577.)

Epling v. Dickson, 170 Ill., 329.

If the Charter allows no costs or expenses it is unconstitutional.

Matter of City of N. Y., 125 A. D., 219; 192 N. Y., 569.

There was no offer of purchase on the City's part, hence the owner was forced into court.

In Epling v. Dickson, (170 Ill., 329) it was said: "Where property is taken, or damaged, for public use, just compensation cannot be made to the property owner, if he is compelled to prosecute in the Courts for his just rights at his own costs."

The owner was allowed no costs or expenses, although to estimate even roughly, the quantity of land and length of the stream which the City's map (Ex. 2) was supposed to cover (the description in the Notice of Intention gave no idea of the amount of land) he was required to call a sur-

veyor (pp. 41, 38). The owner also had to employ counsel and call real estate experts. The award of six cents would pay no part of the expenses.

The City claims that no costs can be allowed under the provisions of the Charter (Chap. 105, Laws 1891, Title 20) unless the proceeding is abandoned or discontinued, in which case "the reasonable and necessary expenses and disbursements incurred * * * shall be paid to such persons." (Charter Sec. 426.)

The Court of Appeals allowed costs against the owner, which were taxed at \$429.44. The owner gets nothing for his land and is burdened with costs and expenses. There was no offer to purchase, as the Condemnation Law requires.

The owner was much embarrassed and put to additional expense because there was no *petition* containing the facts required by the Condemnation Law (Code C. Proc. Sec. 3360), viz.: (1) "A specific description of the property * * * by metes and bounds." (2) "The public *use* for which the property is required and a concise statement of the *facts* showing the *necessity* of its acquisition for such use." (3) The names of the *owners*, etc. (4) That could not *agree* as to purchase. (5) The *value* of the property, etc.

The commissioners thought their services were worth more than \$500, because they say "the *great care* taken in the preparation of the commissioners' report and *his* examination of the *legal questions involved*." (P. 20, 17.)

We mention the failure to award enough for expenses and charging costs to show that the award on its face violates the 14th Amendment.

XV.

Upon the evidence, a reasonable mind could come to but the one conclusion, that the property was of great value. That established the fact as matter of law. (Matter of Totten, 179 N. Y., 112, 116.)

It was proved not only by the owner's witnesses, pages 45 and 54, and evidence referred to in above Statement of Facts under head of "Owner's Evidence of Value, but by

the witnesses for the City, pages 61, 64 to 66, 75, 77 to 84, 88, as appears by their evidence referred to in the preceding statement of facts under the head of "City's Evidence of Value." Land in that vicinity was worth from \$2,000 to \$4,000 an acre, and riparian rights and dock privileges were very valuable, as all the witnesses testified. As near as could be estimated from a City map, drawn on a scale of 300 feet to an inch, there were over 141 acres (p. 42). The docks above Hamburg street upon a part of the river taken in this proceeding, the City's witness, Gurney, testified were worth \$200 to \$300 a foot front (p. 64) and adjoining property would be worth an equal amount if docked and dredged so as to be reached by large vessels, and the City's witness, Newerf, testified that he knew of dockage property just below Hamburg street that is held for \$1,000 a front foot (p. 61) while nearby land without water frontage was worth only \$50 to \$60 a foot.

The City's engineer and witness, Mr. Norton, testified that to dig canals like those of the Lehigh Valley Railroad Co. 200 feet wide through ground on the Tiffit farm, which is near by, the surface of which is 5 feet above water level, and construct docks, \$70 a foot would be ample (p. 84). The first 1300 feet of the river above Hamburg Street averages 270 feet in width, (Record, p. 42) while the channel below already docked is only 170 feet (39 N. Y. App. Div., 333). There is no reason why the river cannot be docked above as well as below Hamburg Street. The bottom is sand and gravel which can be easily dredged (p. 79). The rock which obstructed navigation from below has been excavated at an expense of several hundred thousand dollars (p. 72-3, 80).

See also *People ex rel. L. V. Ry. v. City of Buffalo*, 36 N. Y. Suppl., 191, 198.

City's witness, Griffin, testified: I know that at Hamburg Street they cut through the rock. From Hamburg Street down to Ganson Street was rock bottom and my recollection is that they paid nearly \$300,000 to do that (pp. 72-3). The channel thus excavated was 170 feet wide and was docked.

D. & H. Co. v. City of Buffalo, 39 N. Y. App. Div., 333.

The City's engineer, Norton, testified that the river has been dredged the whole length up to Hamburg street so as to maintain a normal 19 foot channel (p. 83). He also testified that there is some rock above Hamburg street facing the Union Iron Works; that does not interfere with navigation (p. 79); that is the part that has been dredged by private contract (p. 83). There is a channel dredged towards the Union Works side of the river and the rest of the bed of the river is clay and sand and gravel; sand and loam mostly. They have taken the rock out below this point, some of the rock, so as to make a channel for those boats I have mentioned (pp. 79-80).

The river above Hamburg Street for a considerable distance has enough depth to require less dredging than was necessary for the Lehigh Valley canals, even to dredge it the whole width. The City Engineer testified that he figured out a channel $4\frac{1}{2}$ feet deep 40 feet wide to Seneca Street (p. 81). With dockage worth only the lowest sum mentioned by the City's witnesses, after deducting \$70 a foot for the cost of dredging and docking both sides, amounting to \$91,000 for 1300 feet of river, there would be in the 1st Section 2600 feet of dockage worth \$165 a foot over the cost of the improvement. 2600 feet of dockage at \$200 a foot would be worth \$520,000 or \$429,000 over cost of dredging and docking. Witnesses testified that there was a demand for such property and to sales. (See also 36 N. Y., Suppl. 198.) There are about 35660 feet of river taken by this proceeding in addition to the 1300 feet of river near Hamburg Street, situated where everything is valuable, it being in the vicinity of the largest commercial interests in the city almost. The river from its mouth to Hamburg Street is occupied by large establishments and is the center of the great marine business of a port which ranks third or fourth in amount of tonnage in the country (p. 82-3).

Facts proved beyond a possibility of doubt show that the property is worth a large sum and that the Appellate Division was correct in saying that the evidence shows conclusively that such property is valuable. The above statements were facts proved by evidence and were not opinions. Upon the facts thus proved the owner was entitled to more than nominal damages. The commissioners were not at liberty to disregard the evidence.

Matter City of New York, 66 Misc. R. (N. Y.), 488.

Matter City of New York, 67 Id. 195.

Lafin v. C. W. & N. Ry. Co., 33 Fed. R., 420.

Matter City of N. Y. 190 N. Y. 350.

The Appellate Division properly reversed the order of the Special Term confirming the report of the commissioners awarding only six cents to the owner for the property and was right in directing a re-hearing before other commissioners, who may make an award which will come nearer to "just compensation."

The reversal by the Court of Appeals was erroneous.
(Assignment of Errors, specif. seventh, pp. 146-7.)

XVI.

The proceedings of the commissioners in trying the title of the plaintiff in error to the property in question and in receiving evidence to establish grounds for an award of less than the value of the property taken were not due process of law. They exceeded their jurisdiction.

City of Geneva v. Henson, 195 N. Y. 455.

Matter City of N. Y., 190 N. Y. 350.

Matter Com. Public Works, 135 N. Y. App. Div., 561, 569.

Bennett v. Boyle, 40 Barb., (N. Y.), 551.

Matter City Yonkers, 117 N. Y. 572.

Canal Com's v. People, 5 Wend., 469.

Village of Olean v. Steyner, 135 N. Y. 344.

Bell Tel. Co. v. Parker, 187 N. Y. 305.

The land-owners counsel took the objection that the Commissioners have no power to determine disputed claims to the property in question and objected to evidence for the purpose of establishing grounds for an award of less than the value of the property taken (pp. 92-95).

The objections thereto, their rulings and the evidence received subject to such objections, are specified in the above statement of facts and are more particularly stated

in the Assignment of Errors, second specification, page 137, and twelfth specification, pages 148-9, and the record, pages 91-101.

In Matter Com. Public Works (135 N. Y. App. Div., 561, 569) it is said: That the rule to be applied is that *In no case should an award be made for less than the value of property actually taken by condemnation.*' (Matter City of N. Y., 190 N. Y., 350.)"

In Bennett v. Boyle, (40 Barb., 551) it is held: "It is the sole office of the commissioners to estimate and ascertain the value of the lands taken * * * with the damages to be sustained by the owners by reason thereof."

In re City of Yonkers (117 N. Y., 572), Mr. Judge Peckham (then judge of the Court of Appeals, afterwards Justice of the United States Supreme Court) in speaking of eminent domain proceedings, said: "*These proceedings are entirely inappropriate for the purpose of trying the question of title to the property in controversy or for testing the right of the City to an easement.*"

It is provided by the Constitution of the State of New York that: "*The trial by jury in all cases in which it has been heretofore used shall remain inviolate forever.*"

Art. 1, Sec. 2.

The trial by jury has heretofore been used where title to real property was in question.

In Canal Commissioners v. The People (5 Wend. 469) it is said: "The board of appraisal are not a *judicial* tribunal; they are not constituted to discharge any one judicial function in the proper acceptation of the term. * * * The judicial history of this state leaves no doubt as to the cases in which the trial by jury has heretofore been used. * * * The naked right and title to real estate between individuals was never adjudicated upon in our courts of law except upon the finding of a jury; and I hold it inexpedient and improper to do so in any case where the state is interested as a party."

In Village Olean v. Steyner (135 N. Y., 344) it is said: "The question thus necessarily becomes one not of *condemnation*, but of *title*, and ends in the inquiry whether the Village owns or does not own the easement *and that question cannot be raised or tried in a proceeding which assumes the landowner's conceded right and is framed solely to ascertain his compensation.*"

In the case of *Bell Telephone Co. v. Parker*, (187 N. Y., 305), which was an eminent domain proceeding to condemn a right of way in land, the Court quoted from the opinion in another condemnation proceeding in which a jury was called to assess the damages, in which it was held that the jury was limited to the exercise of but one function, which was to ascertain the damages sustained by the land owners whose lands should be taken. The Court held that the *quantum* of interest to be taken could not be left to the jury to determine. The interest to be taken must be defined before it can be appraised, and it is not the province of the jury or commissioners to pass judgment upon the amount of interest a particular person may have. The commissioners are not authorized to appraise an undefined interest, more or less, or decide the extent of the interest they are appointed to appraise.

In *City of Geneva v. Hensen* (195 N. Y., 455), Mr. Justice Hiscock said: "We doubt the right of a petitioner * * * to make a condemnation proceeding at any stage, the means of forcing trial before a referee or commissioners of a *contested title* with defendant. If the proceeding was instituted on the assumption and basis that the defendant has certain property rights to be condemned, the petitioner, having taken advantage of this assumption as a basis for this proceeding, would not be allowed therein to contest such rights. (*Village of Olean v. Steyner*, 135 N. Y., 341.)"

"On the other hand, such petitioner ought not to be allowed, by alleging in a defendant a *lesser estate or title* than he really possessed, to compel such owner to set up his true title and interest and thus contest in the proceeding questions of which he otherwise might be entitled to have a *trial by jury*."

Referring to the case of the Matter of *City of Yonkers*, 117 N. Y. 564, the learned Judge said: "When the case reached this court, Judge Peckham, writing for it, said: "These proceedings are entirely *inappropriate for the purpose of trying the question of title* to the property in controversy, or for testing the right of the City to an easement in the land for the purpose of building the sewer referred to herein. The City authorities have assumed, from the commencement, so far as the record shows, that the appellant was the owner of the land in question, * * Such a pro-

ceeding is not the proper one for the purpose of testing the title to the land which is proposed to be taken, as between the public body and the individual against whom the proceedings are commenced."

In the Matter of Commissioners of Public Works (135 App. Div. (N. Y.) 561-2, 568) it was held that there being a dispute as to the ownership of said parcel, it was the duty of the commissioners to ascertain and report its *value*, and to make an award to unknown owners, because the title being in dispute, no power was vested in the commissioners to determine the controversy.

The Court also held that in no case should the commissioners make an award for less than the *value* of the property actually taken. (Citing 190 N. Y. 350).

The Court confirmed the award made to unknown owners, saying that "it should be affirmed without here considering the particular questions as to title involved, which must be tried out in an appropriate proceeding brought for that purpose."

The Court of Appeals in our case recognized the fact that the title could not be tried before the commissioners. It was said in the opinion of the learned judge who wrote for the Court that "We have assumed, as did the City in the institution of the proceedings, that the respondent was vested with the fee of the river bed." (Page 127) But the Court did not take notice of the fact that the commissioners overruled the objections to *their* trying the title and their receipt of evidence for the purpose of establishing grounds for an award of less than the *value of the property* taken, and, following their erroneous ruling, made an award that bore no relation to the value of the property. The fundamental error of the commissioners was not considered by the Court of Appeals, though it was presented by proper objections and exceptions.

The owner was not helped by a correct ruling by the Court of Appeals on the question of law in respect to the title, as the award made by the commissioners based on a contrary and erroneous ruling was permitted to stand.

The order appointing the commissioners did not refer any issue in respect to the title to be tried before them. There was no such issue. The proceeding assumed the land-owner's right to the property in fee simple. The proceeding to take the property in fee simple included every

interest, and the commissioners were only appraisers appointed to ascertain the just compensation to be paid for the property. Their authority was limited to the inquiry specified in the order appointing them. The condemnation law provides that in case the owner is unknown, or the right to the compensation is disputed, or is doubtful, the money may be paid into Court. The title to it may then be tried before a competent tribunal.

The damages awarded take the place of the land in respect to all the rights and interests dependent upon and incident to it, and the right to the damages may be tried in an action brought for that purpose.

Seton v. City of N. Y., 130 App. Div. 155.

Utter v. Richmond, 112 N. Y. 610.

The ownership of the fund is not determined by the award of the commissioners.

Mitchell v. Vill. of White Plains, 62 Hun (N. Y.,) 231.

Matter of Dept. of Pub. Parks, 53 Hun 298.

"The fact that the objectors failed to make title did not authorize the commissioners to make a nominal award. They should have made the award to unknown owners."

Matter of Dept. of Pub. Parks, 53 Hun (N. Y.,) 298.

Matter of Opening Eleventh Ave., 81 N. Y., 436.

Seton v. City of N. Y., 130 App. Div. (N. Y., 148, 155.

In the case last above cited the Court said: "When the City takes property in fee simple it must pay for such title."

"The fee is the greatest interest that can be granted in real estate. It includes title, the right of possession and the right to use for any purpose that may be lawful."

Matter of Brookfield, 176 N. Y. 146.

"Fee without other words means fee simple Litt. (Sect. 293). It is the largest Estate and most extensive interest that can be enjoyed in land, being the entire property therein."

1 Burrill's Law Dictionary, 476.

The rights of the owner are real and entitle him to substantial damages and where only a nominal award is made he is entitled to a new appraisal. 176 N. Y. 146, *supra*.

The proceeding takes the premises in fee simple, which

includes every interest, and damages should have been awarded accordingly.

Seton v. City of N. Y., 130 App. Div. (N. Y. 148, 155).

Matter of City of N. Y., 190 N. Y., 350.

The commissioners exceeded their jurisdiction in trying the title and receiving evidence to establish grounds for an award of less than the value of the property taken. Their proceedings were not due process of law.

They were not empowered to receive evidence to subvert the owner's title in whole or in part in a proceeding to take the property in fee simple without excepting any interest.

The exceptions to the rulings of the commissioners and to their receipt of the evidence objected to required a reversal of the order confirming the report and the answer of the Court of Appeals to the fourth certified question was erroneous.

XVII.

Evidence admitted by the commissioners and their rulings on the hearing before them tended to subvert the right of the owner to that just compensation to which he was entitled and the exceptions thereto and to the report on the ground of insufficiency of the award called for a reversal of the order confirming the appraisal commissioner's report.

Assignment of Errors, twelfth specif., page 148.
Matter of Water Comr's of Amsterdam, 96 N. Y., 361.

Matter Brookfield, 176 N. Y., 138.

Matter S. B. R. R. Co., 128 N. Y. 93.

T. & B. R. R. Co. v. N. T. Co. 16 Barb. (N. Y.) 100.

Matter City of Buffalo, 17 State Rep. (N. Y.) 371.

Matter City of N. Y., (Consolidated Gas Co.) 190 N. Y., 350.

Matter Gilroy, 85 Hun 424.

Trustees College Point v. Dennett, 2 Hun 269.

Matter Met. El. R. Co., 76 Hun 375.

Matter N. Y. C. & H. R. R. Co., 6 Hun 149.

Also cases cited under Point XII and points below.

Since the commissioners are required to report their proceedings to the Court with the minutes of the testimony taken by them for confirmation before their report has any force, and their award is open to review upon the evidence, the commissioners could not disregard the testimony of the witness. The award must be supported by the evidence or it cannot stand.

Matter City of N. Y., 67 Misc. R. 195 (N. Y.)

Matter City of N. Y., 66 Misc. R. 488.

Laflin v. C. W. & N. R. Co., 33 Fed. R. 420.

XVIII.

The maps and deeds received in evidence by the commissioners to controvert the title of the plaintiff in error were incompetent, and their admission was evidence of the adoption by the commissioners of erroneous principles.

(See above Statement of Facts and 12th Specif. of Assignment of Errors, page 148 and record pages 98, 100, 101.)

Exceptions to competency of evidence which involve questions giving the Court jurisdiction can be considered here on Writ of Error.

Dower v. Richards, 151 U. S. 667.

Mackay v. Dillon, 4 How. 421, 447.

In T. & B. R. R. Co. v. Northern Turnpike Co. (16 Barb. (N. Y.) 100), it was held: "Commissioners of appraisal should be guided, in their proceedings, by the established *rules of evidence*. No testimony should be received which a Court of law would reject; and none should be rejected which a Court of law would hold to be admissible."

Matter N. Y. C. & H. R. R., 15 Hun (N. Y.), 63.

The Buffalo Charter (Sec. 424) provided that the commissioners should hear "*all legal evidence*."

The inquiry is whether the proceedings, by which the plaintiff in error has been deprived of property, were due

process of law. Receipt of incompetent evidence affecting his title and the value of the property is a *departure from due process of law*. On those questions this Court has jurisdiction. Such evidence was offered, objected to and received and the decisions receiving it were excepted to.

The jurisdiction of the commissioners to determine disputed claims to the property and to receipt of evidence to establish grounds for an award of less than the value of the premises taken was objected to; the objections were overruled and exceptions taken to the rulings and evidence objected to on those grounds, as well as on the ground of incompetency, was erroneously received. (Record, pages 148-150.)

Unauthenticated *maps* were received on which lots appeared to be bounded by the river without posts, lines or other limitations than the river itself. No conveyance was made by the owner with reference to those maps. They did not agree with the field notes or original authentic map of the survey, referred to in such conveyances as were executed by the owner, which showed that the lots did not extend to the river but were limited by posts and lines back from it. They were also objected to as not the best evidence.

The incompetent evidence received was given weight and formed the basis for the claim made by the counsel for the City that the title was encumbered by easements. The competent evidence was to the contrary. The exceptions to the incompetent evidence were well taken and called for a reversal of the order of the Special Term confirming the report of the commissioners.

Donohue v. Whitney, 133 N. Y. 185.

When a party may have been injuriously affected by erroneous rulings in respect to evidence, and the contention based on it respecting the owner's rights, the report should not be confirmed.

Troy & B. R. R. Co. v. N. T. Co., 16 Barb., 100 (N. Y.).

The exceptions to the admission in evidence of City's Map Exhibit 5 were well taken.

Matter N. Y. C. R. R., 70 N. Y. 191.

Matter Water Comr's, 96 N. Y. 351.

2d Spec. Error p. 137; 12th Spec. p. 148-150.

Objections and exceptions, p. 93, 100, 102-4.

The map (referred to by Slade) on its face shows that it is not an *original* map, but one made up from 4 or 5 different surveys, viz., 2 made by James Sperry, one made by Cook, one made by Lovejoy & Emslie. It does not show on its face who made it and there is no evidence of that fact. The map purports to be on a scale of *30 chains to an inch*. The *original* Emslie map produced by Mr. Davey (pp. 102-104) was on a much larger scale and had *red* lines showing courses and distances (lot lines) between stakes on the bank, and *black* lines showing the top of the bank (p. 103). Exhibit 5 is too small to show those lines and was apparently intended to be used more especially to show the lots and mill sites beyond the present City line (of 1853) and Cazenovia Creek where the field notes show that in Cazenovia Creek the lot lines often went to the middle of the stream or crossed the bed, but did not as to Buffalo Creek. P. 87.

The map was objected to (p. 100) "as incompetent and this is not the map referred to in the deed. There is no evidence that any conveyance by any trustee of the Ogden Land Co. was ever made with reference to this map, and the same is not the best evidence. It is not an original map. It is not signed or authenticated by anybody." (Also P. 101): "I object to this map even if it were something made by Peter Emslie, as a declaration made after his employment as surveyor had ceased." "Objection overruled; defendant excepts." City's "Map Exhibit 5" is not dated. City's witness Doorty states that the field notes show the Sperry survey as made in 1843, and the Emslie survey in 1844 (p. 99). There is no evidence as to when Cook's and Jones' surveys were made.

The exceptions to the admission in evidence of City Assessors' Maps Exhibit 6 (p. 101). (Sample annexed between pages 118 and 119) were well taken.

The maps on their face were incompetent.

Assessors' maps are notoriously inaccurate and are continually being changed as new conveyances are made.

There was absolutely no proof of their accuracy. The maps were objected to (p. 101) "As incompetent and irrelevant; that the maps were not made by the trustees or any representative of the Ogden Land Co., or persons interested, and that no conveyance from Charles E. Appleby, trustee, or any of his predecessors, was ever made by these maps; they have never been recognized by him or any of his predecessors, and are incompetent as evidence to affect any right or interest of Mr. Appleby, as trustee. Objection overruled; defendant excepts; maps received in evidence and marked Exhibit No. 6." (See other objections p. 93.)

XIX

The award was made on erroneous principles. The award itself is conclusive evidence of that fact. The City was taking the land and not as they claimed "a theoretical right" and the same right "as that of any other citizen" (p. 46).

The following question, asked of a witness by Commissioner Greiner, discloses the erroneous principle adopted by the appraisers, viz.: "Assuming that this is a public highway, and that the *only interest* that the person has in whom the title is, *is the same as that of any other citizen, same as your interest*, the right to go in and upon it, what would you say then was the value?" (p. 45). Owner's counsel objected and excepted to the question and ruling.

See statement under that heading in the preceding statement of facts, showing that the rulings of the commissioners, the evidence received, the statement of plaintiff's counsel that "the only person or corporation whose rights are sought to be taken in this proceeding are the rights of the trustees of the Ogden Land Company," without defining those rights, while in fact the proceeding takes the property whoever owns it and is not limited in its application, as stated by the City's counsel, and the

award of six cents damages, although facts were proved from which a reasonable mind could reach but the one conclusion that the property has substantial value, and the decisions of the commissioners overruling objections to their trying the title and to the receipt by them of evidence to establish grounds for an award of less than the value of the property taken, and the claim made by the petitioner's counsel that the owner was not entitled to an award of the value of the unencumbered title in fee, are sufficient evidence that the award was made on erroneous principles.

Matter Water Com'rs, 96 N. Y. 351, 361.

Matter City of N. Y., 190 N. Y. 350.

Matter N. Y. C. & H. R. R., 15 Hun (N. Y.), 63.

Under the statement of the City's counsel, the quantum of interest was too uncertain to be appraised.

Bell Tel. Co. v. Parker, 187 N. Y. 299.

Matter of Simmons, 138 N. Y., App. Div. 667.

The defendant was entitled to substantial damages.

Matter S. B. R. R. Co. 128 N. Y. 93.

Matter Brookfield, 176 N. Y. 138, 148.

Williams v. Mayor, etc., 105 N. Y. 437.

Matter City New York, 190 N. Y. 350.

The fact that only a nominal award was made, though the property in fee simple undoubtedly possessed large value, is conclusive proof that the award was made on erroneous principles. The cases are numerous in which gross inadequacy has been held to be sufficient ground for setting aside the award.

It was proved that the property was worth more than \$200,000. The award of six cents was too grossly inadequate to stand. It could not have been made on correct principles and the Appellate Division properly granted a new appraisal.

The owner was entitled to substantial damages (just compensation)—only nominal damages were awarded. For that reason he was entitled to a new appraisal.

Matter Brookfield, 176 N. Y., 138, 148.

The commissioners did not appraise what they were appointed to appraise.

The ruling of the commissioners admitting evidence to establish grounds for an award of less than the value of the property taken was inconsistent with taking the property in fee simple, which was the declared intention and purpose of the proceeding.

Where the land is taken in fee "there could be no just measure of compensation but the whole value of the lands with the damages for relinquishing them."

Heyward v. Mayor of N. Y. 7 N. Y. 325.

Where commissioners award much less than the value of the property taken according to the testimony of every witness put upon the stand, it is an arbitrary exercise of power not justified by law.

N. Y. W. S. & B. Co. v. Yates, 18 N. Y. Weekly Dig. 272.

The Court reviews the testimony before confirming the report. The report must be sustained by the evidence or it cannot stand.

Jefferson etc. v. Brown, 40 Ind. 549.

Matter City of N. Y. 66 Misc. R. (N. Y.) 488.

67 Id. 194-5.

The City's evidence was directed to the value of the title assumed to be defective instead of the value of the property irrespective of questions of title, and was so misleading as to furnish grounds for setting aside the report and granting a new appraisal.

If the City still contends for the same principles of law it did before the Commissioners and Courts its brief will show on its face that the award was made on erroneous principles.

XX.

"The jurisdiction of the Court of Appeals is defined in Secs. 190 & 191 (of the Code of Civil Procedure) and unless authority for the appeal can be found there, it does not exist."

Roe v. Boyle, 81 N. Y. 307 (Supra).

Sections 190 and 191 are printed at length under point 4.

The appeal could not be taken under Sec. 191, which simply limits the right to appeal given by Sec. 190 and does not further extend it.

Roe v. Boyle, 81 N. Y., 307 (Supra).

Young v. Fox, 155 N. Y. 618.

Under subd. 1 of Sec. 190, appeals can be taken as of right only from judgments or orders *finally* determining actions or special proceedings, and from orders granting new trials *on exceptions*, where the appellant *stipulates for judgment absolute* in case of affirmance.

The order was in a special proceeding and was not final.

An order granting a new trial in a special proceeding is not appealable.

Matter of Gibson, 195 N. Y. 466.

Roe v. Boyle, 81 N. Y. 305.

Matter of N. Y. & H. R. R. Co., 98 N. Y. 12, 18.

In re Horsfalls, 77 N. Y. 514.

In re Kings Co. Ry. Co., 82 N. Y. 95.

Matter So. Boul. R. R. Co., 128 N. Y. 93.

No stipulation for judgment absolute was given. The Court can not dispense with the stipulation for judgment absolute by allowing the appeal and certifying questions for review.

N. Y. C. & H. R. R. Co. v. State of N. Y. 166 N. Y. 286.

An assessment of damages is not a trial; therefore a rehearing of proceedings to assess damages is not a new trial.

Matter Manhattan R. Co. v. Kent, 80 Hun, 559; aff'd, 145 N. Y. 595.

Bassett v. French, 155 N. Y. 46.

Bossout v. R. W. & O. R. Co., 131 N. Y. 37.

Under subd. 2 of Sec. 190, the jurisdiction is limited to determining certified questions of *law* and to certifying answers to those questions to the Appellate Division. No other questions are brought up.

Commercial Bank v. Sherwood, 162 N. Y. 316, 317.

Young v. Fox, 155 N. Y. 615, 618.

That subdivision does not provide for sending up the *whole* case or for a decision upon the whole case. On the

contrary it is prohibited. It says "the appeal brings up for review the question or questions so certified, and no other."

In the absence of a provision permitting it, the whole case cannot be sent up or decided.

Commercial Bank v. Sherwood, *supra*.

Felsonheld v. U. S. 125, 134.

Graver v. Faurot, 162 U. S., 435.

United States v. U. P. R. Co., 168 U. S., 512.

Jewell v. Knight, 123 U. S., 426, 432.

Only questions of law can be certified for review.

Questions of fact are not within the jurisdiction of the Court.

Tousey v. Hastings, 194 N. Y., 79.

Matter of Thorne, 162 N. Y., 238.

Matter of Bd. of Education, 173 N. Y., 321.

N. Y. Constitution, Art. 6, Sec. 9.

Code of Civil Procedure, Sec. 191, subd. 3; Sec. 190, subd. 2.

XXI.

The jurisdiction of the Court of Appeals in respect to the questions it may review cannot be enlarged by certifying question.

Lewin v. Lehigh V. R. Co., 169 N. Y. 336.

City Trust, etc. v. Am. B. Co., 182 N. Y. 291.

Commercial Bank v. Sherwood, 162 N. Y. 317.

Matter of Westerfield, 163 N. Y. 209.

N. Y. C. & H. R. R. Co. v. State of N. Y. 166 N. Y. 286.

Assignment of Errors, specif. 8, p. 147.

It cannot review questions of fact or matters of discretion, though certified for review. Its jurisdiction does not include such questions.

Matter of Westerfield, 163 N. Y. 209.

Lewin v. L. V. R. C., 169 N. Y. 336.

Caponigri v. Altieri, 164 N. Y. 477, 480.

The N. Y. Code of Civil Procedure gives the Appellate Division discretionary power to direct a new appraisal. Sec. 3377.

Sec. 3359 of the Code of Civil Procedure is as follows: "Whenever any person is authorized to acquire title to real property, for a public use by condemnation, the proceedings for that purpose shall be taken in the manner prescribed by this title." In 1896 the Code was amended so as to include in the word "person", "the State and a political division thereof." Sec. 3358.

Sec. 3375 is as follows: "Appeal may be taken to the Appellate Division of the Supreme Court from the final order, etc."

Appeal may be taken from the order in condemnation proceedings prosecuted by the City of Buffalo and the provisions of the Code are applicable.

Matter of City of Buffalo, 17 N. Y. State Rep., 371 & Point XVII.

Sec. 3377: "On the hearing of the appeal from the final order the Court may direct a new appraisal before the same or new commissioners, in its *discretion*, etc."

It is also held that the discretion of the Special Term may be reviewed by the Appellate Division. Points XXII. XXIII.

In *City Trust Co. v. Am. B. Co.*, (182 N. Y., 290-1) Haight J. said: "The first question raised is as to whether this order is appealable. No appeal lies from such an order as a matter of right. (*Bassett v. French*, 155 N. Y., 46). Neither does an appeal lie even though certified by the Appellate Division where the assessment of damages involved a *discretion* on the part of the Court or jury making the assessment. (*Lewin v. Lehigh V. R. Co.*, 169 N. Y. 336)."

In the same case, page 297, Mr. Judge O'Brien said: "The Supreme Court cannot send such a case here on a certificate that certain specified questions of law have arisen that should be reviewed by this Court."

None of the Court disagreed with the above proposition quoted from the opinion of Judge Haight.

They all approved of cases which hold that questions of fact and matters of discretion could not be certified to the

Court of Appeals, and that assessments of damages involved questions that could not be certified to the Court of Appeals for review. In that case, however, the amount to which the plaintiff was entitled was liquidated and certain. No question of fact was involved and a majority of the Court considered that the question of law was within their jurisdiction.

XXII.

The Appellate Division had discretionary power to grant a new appraisal and the exercise of its discretion is not subject to review by the Court of Appeals.

Code C. P. Sec. 3377, *supra*.

City Trust etc. v. Am. B. Co., 182 N. Y. 290-1.

Bassett v. French, 155 N. Y. 46.

Bassout v. R. W. & O. R. R. Co., 131 N. Y. 37.

Matter of N. Y. W. S. & B. Ry. Co., 94 N. Y. 287.

Matter of N. Y. C. & H. R. R. Co., 98 N. Y. 12, 18.

Matter of Kings Co. El. Ry. Co., 82 N. Y. 98.

Allen v. Meyer, 73 N. Y. 1.

Schneider v. City of Rochester, 155 N. Y. 619.

Martin v. Windsor Hotel, 70 N. Y. 101.

Hoes v. Edison Gen. El. Co., 150 N. Y. 87, 89.

People ex rel. Putnam v. Palmer, etc., 197 N. Y. 524.

Matter of Curtiss, 199 N. Y. 36, and cases cited under Points XII and XXIII.

XXIII.

In condemnation proceedings in the State of New York, the report of commissioners does not become effective until confirmed by the Supreme Court. That court has power to review the proceedings and to direct a new appraisal, when for any reason it seems just to do so.

Matter of City of Buffalo, 17 N. Y. State Rep., 371.

Code C. P. Secs. 3358, 3359, 3371, 3375, 3377.

Laws of N. Y. 1891, Chap. 105, Sec. 426.

Matter of Kings Co. El. R. Co., 82 N. Y. 98.

The provisions of the Code and the Condemnation Law relating to *appeals* apply to eminent domain proceedings prosecuted by the City of Buffalo.

Matter of City of Buffalo, 17 N. Y. State Rep. 371.

An appeal lies from the order of confirmation to the Appellate Division of the Supreme Court.

Matter of City of Buffalo, 17 N. Y. State Rep. 371. (This is a General Term decision relating to an eminent domain proceeding by the City of Buffalo.)

Code Civil Pro. Secs. 1356, 3375.

Matter of S. B. R. Co., 128 N. Y. 93, 98.

Upon such appeal the Appellate Division may review the discretionary orders of the Special Term, and exercise its own discretion in the matter.

Code C. P. Sec. 3377.

Matter of City of Buffalo, (*supra.*), 17 State R. 371.

Martin v. Windsor Hotel Co., 70 N. Y. 101.

Hanover Fire Ins. Co. v. Tomlinson, 58 N. Y. 215.

Livermore v. Bainbridge, 56 N. Y. 72.

Matter of N. Y. C. & H. R. R. Co., 64 N. Y. 60, 63.

Matter of Horsfalls, 77 N. Y. 514.

Bassett v. French, 155 N. Y. 46.

“The General” (Now called Appellate Division, Code C. P. Sec. 220) “and Special Terms of the Supreme Court are but different parts of the same court of equal *original* jurisdiction, and the former can review and correct orders made by the latter whether discretionary or not, provided they affect matters of substance.”

Martin v. Windsor Hotel Co., 70 N. Y., 103.

Maier v. Duffin, 134 App. Div. (N. Y.), 594.

Pietraroia v. N. J. & H. R. R. Co., 197 N. Y. 437.

But the facts and discretionary orders of the Appellate Division are not reviewable by the Court of Appeals.

70 N. Y. 103, *supra.*

197 N. Y. 437, *supra.*

Livermore v. Bainbridge, 56 N. Y. 72.

Bassett v. French, 155 N. Y. 46.

Allen v. Meyer, 73 N. Y. 1.

Lewin v. Lehigh V. Ry. Co., 169 N. Y. 336, 338,
and cases cited under Point XII.

Matter of Curtiss, 199 N. Y. 36.

As the order appealed from was *silent* as to the ground upon which it was made, whether of law or fact, the Court of Appeals was bound to suppose that the Appellate Division examined the case upon the matters of fact involved, as well as upon the questions of law presented, and based the order made upon conclusions drawn from the former as well as the latter.

Matter of Kings Co. El. Ry. Co., 82 N. Y. 98.

Brennan v. City of N. Y. 123 App. Div. R., 7
(N. Y.).

Schneider v. City of Rochester, 155 N. Y. 619.

Hoes v. Edison Gen. Elec. Co., 150 N. Y. 87, 89.

Goodwin v. Conklin, 85 N. Y. 21.

Schryer v. Fenton, 162 N. Y. 444.

Henavie v. N. Y. C. & H. R. R. Co., 154 N. Y. 278.
Point XII, *supra*.

"In the case in hand the use of this rule will not harm the appellants, for it is palpable from the whole case, and especially from the prevailing opinion of the General Term * * * that the refusal to confirm the report of the commissioners was because the General Term deemed it, as matter of fact, improper, inexpedient, and impolitic to do otherwise."

Matter of Kings Co., El. Ry. Co., 82 N. Y., 98.

XXIV.

The Court of Appeals is an Appellate Court and has only such jurisdiction as the statute confers.

Hoes v. Edison Gen. El. Co., 150 N. Y. 87.

Roe v. Boyle, 81 N. Y. 307.

Shankland v. Washburn, 5 Pet. (U. S.), 390.

Mills v. Brown, 16 Pet. (U. S.) 525.

Sampson v. Welsh, 24 How. (U. S.), 207.

Malone v. Sts. P. & P. Ch., 172 N. Y. 269.

It does not include an appeal from an order granting a new trial in a special proceeding, or from an order that is not a final order.

Roe v. Boyle, 81 N. Y. 305.

Matter of Gibson, 195 N. Y. 466.

Matter of Curtiss, 199 N. Y.

Jurisdiction cannot be conferred by consent of parties or by written stipulation.

Hoes v. Edison G. E. Co., 150 N. Y. 87, 89.

Roe v. Boyle, 81 N. Y. 306.

Instead of consenting, objections were taken and a motion was made to dismiss for want of jurisdiction (pp. 123, 129).

A judgment or decree of a court in excess of the power granted to it by the law of its organization is void for such excess although the court may have jurisdiction of the parties and subject-matter.

Bigelow v. Foust, 9 Wall., 339, 351.

A judgment rendered without jurisdiction should be reversed.

Continental Ins. Co. v. Rhoades, 119 U. S., 237.

Seneca Nation v. Appleby, 196 N. Y. 322-3.

XXV.

The Appellate Division is not authorized by Sec. 190, subd. 2 of the Code to send up the whole case for review and disposition, and the statute does not authorize the Court of Appeals to determine the whole case or anything but the questions of law certified to it. It did not have authority to decide the whole case and render final judgment.

Code C. P. Sec. 190, subd. 2. Copied in point 4.

Graver v. Faurot, 162 U. S., 435.

U. S. v. U. P. R. Co., 168 U. S., 512.

Commercial Bank v. Sherwood, 162 N. Y. 316, 317.

C. B. & Q. Ry. v. Williams, 205 U. S., 444.

In C. B. & Q. Ry. v. Williams, (205 U. S. 444) it was held: "Where the question certified practically brings up the entire case, and this Court is asked to pass upon the

validity of a contract *and indicate what the final judgment should be*, the certificate will be dismissed and the questions not answered."

It is unreasonable to suppose that the Legislature intended that the Court of Appeals should render judgment upon the whole case without having the whole case before it. The provisions of the Code are against such a presumption.

Where the appeal is from a judgment or order finally determining actions or special proceedings, the appeal is from the whole judgment or order and is not limited to a review of questions. (Code Sec. 190, subd. 1.) The appeal in this case could not be taken under that provision because the order was not final.

Matter of Gibson, 195 N. Y. 465.

Where appeals are taken under Sec. 191 by permission, they are such as might be taken as matter of right under subd. 1 of Sec. 190 but for the restriction in Sec. 191. When the restriction is removed the appeal is a general appeal from the whole judgment and is not limited to questions and no questions are necessary.

Young v. Fox, 155 N. Y. 616, 619.

This appeal is not authorized by that section.

Where the appeal is from an order granting a new trial in an *action*, the appeal may be taken as matter of right on giving a stipulation for judgment absolute in case of affirmance. Such an appeal brings up the whole case.

An appeal from an order granting a new trial in an action cannot be taken by permission and certifying questions.

N. Y. C. & H. R. R. Co. v. State of N. Y. 166 N. Y., 286.

Mundt v. Glokner, 160 N. Y. 371.

The stipulation is necessary. Permission and questions are not necessary and will be of no avail. *Id.*

An appeal from an order granting a new trial in a special proceeding cannot be taken with or without a stipulation for judgment absolute.

Matter of Gibson, 195 N. Y. 466.

After a new trial has been granted in a special proceed-

ing, it may be prosecuted until there is an order finally determining the proceeding. Then an appeal may be taken as a matter of right under the first subdivision and the appeal is unlimited. No questions are necessary.

Mundt v. Glokner, 160 N. Y. 571.

Code Sec. 190, subd. 1.

Where questions are certified in cases of appeals where the appeal brings up the whole cause and questions are not necessary, they will not be answered if certified.

Mitchell v. Dunmore, 199 N. Y.

Where a question of law arises before a final judgment or order (It must be *before*, to be certified for review, Mundt v. Glokner, 160 N. Y., 571), which in the opinion of the Court ought to be reviewed by the Court of Appeals, the Court may certify that one or more questions of law have arisen, which, in its opinion, ought to be reviewed by the Court of Appeals, in which case the appeal brings up for review the questions or question so certified, and no other; and the Court of Appeals shall certify to the Appellate Division its determination upon such questions. *Expressum facit cessare tacitum*.

The word "appeal" in subd. 2 means "to refer to another for the decision of a question controverted." (Webster's Dictionary) As it expressly states that the appeal brings up for review the question or questions so certified, and no other; and the Court of Appeals shall certify to the Appellate Division its determination upon such questions it does not require or authorize the Court to decide whether the whole cause should be decided in favor of one party or for the other, and the question ought not to be one asking for that.

Williamsport Bk. v. Knapp, 119 U. S., 357.

Jewell v. Knight, 123 U. S., 426, 432.

The questions which in the opinion of the Court "ought to be reviewed by the Court of Appeals" may not include all of the questions of law and fact and matters of discretion there are in the cause entitling the party to a new trial or rehearing. It is not expected that they will. The whole case is not appealable before final determination. The questions may be weak or irrelevant, or such as the Court of Appeals cannot decide, (Blaschko v. Wurster, 156 N. Y. 445), as they are in this case, and such questions may

be answered adversely although the decision below may well stand upon other grounds, and if the whole cause were brought up the respondent would be entitled to affirmance, if the record presents any error, either of law or of fact, which called for a reversal of the judgment.

Bank of China v. Morse, 168 N. Y. 483.

Caswell v. Hazard, 121 N. Y. 491.

Cobb v. Hatfield, 46 N. Y. 533, 538.

By rendition of *final* judgment on questions certified without consent of the respondent, which did not cover questions of fact and of law and matters of discretion on which he was entitled to the order of reversal made by the Appellate Division, he was deprived of what he would have been entitled to on a general appeal and the appellant was given the benefit of a final judgment in his favor on questions of his choosing, without risk of final judgment against him if the questions were decided against him and the order granting a rehearing were affirmed. He did not give a stipulation for judgment absolute and none could be rendered against him on affirmance of the order. He then could have the benefit of a new trial or rehearing. If the questions are decided in his favor, he wins the case. If they are decided against him he does not lose it but has a new trial.

The respondent loses the case on questions which omit the grounds upon which he was entitled to the order of reversal by the Appellate Division rendered in his favor.

Such a result was not within the intention of the Legislature, as it appears in the words of the statute.

The certification of questions of law was intended to obtain a decision upon *them* to aid the Court below in the final decision of the cause, and not to authorize a final determination of the cause by the Court of Appeals.

Commercial Bank v. Sherwood, 162 N. Y. 316, 317.

Young v. Fox, 155 N. Y. 616.

Roe v. Boyle, 81 N. Y. 305.

C. B. & Q. Ry. v. Williams, 205 U. S., 444.

Under Sec. 191 where the Court certifies *after* judgment that a question of law is involved which ought to be reviewed by the Court of Appeals and grants permission to appeal, the appeal is from the judgment, and all the ques-

tions there are in the record are brought up for review.

The difference between the appeal under Sec. 191 and a certificate of questions for review under subd. 2 of Sec. 190 is explained by the Court in *Commercial Bank v. Sherwood* and it was there held that the latter provision is one contemplating the existence of questions of law in determinations not final in their nature, which may affect the ultimate judgment, as they are decided one way or the other, and as to which the Appellate Division is entitled to the opinion of this Court. (*Commercial Bank v. Sherwood, Supra.*, 317). It is the *opinion* in respect to the questions of law asked for, and not a *judgment* determining the whole case.

Where the appeal is general, the determination of the Court is remitted to the Court below *to be enforced*. Code Sec. 194. The determination of certified questions is to be certified to the Appellate Division to aid it in the final decision of the cause, which has not been removed from its jurisdiction by certifying questions of law for review.

The Court of Appeals has only such jurisdiction as the statute confers.

Roe v. Boyle, 81 N. Y. 307.

Hoes v. Edison G. E. Co., 150 N. Y. 87.

Jurisdiction to render final judgment on the whole cause cannot be found in subd. 2 of Sec. 190 and the appeal taken in this case was not authorized by any other provision.

There is no reason for questions and answers if the Court of Appeals renders final judgment and the Court below has nothing left to be determined. In no case where the appeal is general are questions and answers required. If it is not general nothing should be determined that is not before the Court.

The provisions of the United States Judiciary Act allowing the Circuit Court of Appeals to certify questions of law is not held to be authority for the Supreme Court to dispose of the whole cause; and where the questions are such as to call for it, the Court dismisses the certificate.

Graver v. Faurot, 162 U. S., 435.

United States v. U. P. R. Co., 168 U. S., 512.

The Judiciary Act, however, contains a provision authorizing the Supreme Court, where questions of law are certified to it, to require that the whole record *and the cause*

be sent up for its consideration and directing that *thereupon* it shall decide the whole matter in controversy. There is no such provision in the Laws of the State of New York.

A decision of the whole cause by a Court that does not have the whole cause before it is not due process of law, and the provision for questions of law to be certified for review ought not to be construed as authorizing it.

A law permitting judgment upon the whole case by a Court which is restricted to a review of questions which do not cover the whole case denies the right to be heard before judgment is pronounced, and contravenes the provision of the Constitution of the United States forbidding any state to deprive any person of property without due process of law. *The right to be heard includes the right to be heard on all of the case. The prevailing party is entitled to be heard on all grounds upon which his judgment may be maintained.*

Bank of China v. Morse, 168 N. Y. 483.

Cobb v. Hatfield, 46 N. Y. 533, 538.

If it was intended that the Court of Appeals should render final judgment on the whole case, the statute should have stated that the Court shall determine the whole cause and should have provided for bringing up the whole cause for review, and should not have stated that the questions certified are brought up for review, "*and no other,*" and that the determination upon those shall be certified to the Appellate Division.

The New York statute was passed in 1895, after the practice respecting certification of questions to the United States Supreme Court was settled and is analogous to it except that the Legislature did not intend to allow a general appeal upon the direction of the Court of Appeals.

Grannan v. Westchester Assoc., 153 N. Y. 449.

XXVI.

If this could have been a general appeal bringing up the whole cause, it must have been dismissed if there were controverted questions of fact.

Matter of Thorne, 162 N. Y. 238.

Matter of B'd of Education of N. Y. 173 N. Y. 321.

Chapman v. Comstock, 134 N. Y. 512.

The whole includes all of its parts, (axiom) and what could not be done upon the whole case surely cannot be done upon part of it, but the Court of Appeals reversed the whole case and rendered *final* judgment, without having it all for decision, upon the ground that there was a conflict of evidence, which would have prevented it from reviewing the decision of the Appellate Division if the whole case had been brought before it on appeal.

Tousey v. Hastings, 194 N. Y. 79.

Allowance of an appeal from a non-appealable order does not affect its disposition. Where the appeal is from an order not reviewable, it must be dismissed notwithstanding its allowance.

Caponigri v. Altieri, 164 N. Y. 476, 480.

Questions of fact and matters of discretion cannot be reviewed though certified for review.

City Trust Co. v. Am. B. Co., 182 N. Y. 291.

XXVII.

Questions that the Court of Appeals decided it did not have jurisdiction to answer, which were like the first two questions in this case.

In the *Matter of Westerfield* (163 N. Y., 210), the question certified was: "1. Whether, *upon the facts* shown by the record herein, Thomas Rogers is personally liable for and chargeable with the amount of the *devastavit* suffered by the trust estate on or before December 9, 1895?"

The Court held that it was a question it had no power to review (P. 210) and that the determination of the rights of the parties with respect to the chief item in controversy is largely a question of fact. (P. 213).

In the case now before the Court, two of the questions are similar to the above, the first question being: "Is Charles E. Appleby, etc., *under the facts in this proceeding entitled* to an award of more than six cents, etc." Were it permissible to go beyond the questions, the *facts* must be gathered from the record, and if the evidence in respect to them is conflicting, the question is one that the Court had no power to review as they decided in the case

above cited, and if the evidence was not conflicting it proved that the value of the property was more than nominal and their answer to it in the negative was erroneous.

In the case of *Malone v. Sts. P. & P. Ch.*, 172 N. Y., 269, 279, the Court said: "Under the provisions of the Code, we are limited to the questions certified" and dismissed the appeal because the questions certified could not be decided without deciding questions not certified.

In *Matter of Townsend Ave.* (175 N. Y., 508), the question was: "Did the commissioners adopt an erroneous principle in making their assessment in this proceeding?" The Court declined to answer it because under the record it did not present a question of law only, but a mixed question of law and fact.

XXVIII.

Certified Questions.

It is settled by numerous decisions of this Court that under a statute permitting questions of law to be certified for review that each question must be a distinct point or proposition of law, clearly stated, so that it can be distinctly answered without regard to the other issues of law in the case; must be a question of law only and not a question of fact, or of mixed law and fact, and hence cannot involve or imply a conclusion or judgment upon the weight or effect of testimony or facts adduced in the case; and cannot embrace the whole case, even where its decision turned upon matter of law only, and even though it was split up in the form of questions. The fundamental facts must be stated in the question, not evidential facts.

Williamsport Bk. v. Knapp, 119 U. S., 357.

Jewell v. Knight, 123 U. S., 426, 432.

United States v. U. P. R. Co., 168 U. S., 512.

Sigafus v. Porter, 85 Fed., 689.

Felsenheld v. U. S., 186 U. S., 125.

Cross v. Evans, 167 U. S., 60.

Grannan v. Westchester Assoc., 153 N. Y. 449, 458.

Malone v. St. Peter and St. Paul Ch., 172 N. Y. 269.

Matter Westerfield, 162 N. Y. 209.

Lewin v. L. V. R. R., 169 N. Y. 336.

Marx v. Bogan, 188 N. Y. 431

Where the certificate does not comply with the rules above stated it should be dismissed. *Id.*

It is necessary to have premises before a conclusion. So, a proposition or question of law requires *a statement of the facts* on which it is based, before it can be answered. That necessity is recognized in this Court by Rule 37, which provides: "Where, under Sec. 6 of the said act, a Circuit Court of Appeals shall certify to this Court a question or proposition of law, concerning which it desires the instruction of this Court for its proper decision, *the certificate* shall contain a proper *statement of the facts* on which such question or proposition of law arises." There were no "findings of fact" in our case. (C. C. Proc., Sec. 1022).

The first question, "Is Charles E. Appleby, as surviving trustee of the Ogden Land Company, UNDER THE FACTS in this proceeding, *entitled* to an award of more than six cents damages, etc.," does not clearly express the point or proposition of law which has arisen and is supposed to entitle or disentitle him to an award of more than six cents, and it *does not state what the facts in this proceeding are*, or how they are to be ascertained or determined, or whether or not it is expected that the Court of Appeals, which has no power to review anything but questions of law, is to determine from evidence what the facts are.

Who can say what question of law has been determined by a simple answer in the negative? The question asks if *he* is entitled. Is the question directed towards his title or to the value of the property? Is it because they have decided that Mr. Appleby is not the owner or that his title is so encumbered as to be valueless, and if so, how? What proposition of law or fact appears to be determined by the simple negative answer?

The Constitution requires compensation. Is that denied by the negative answer? Is it claimed that compensation may be less than the value of the *property* taken, or that the amount is affected by the purpose for which it is taken? What were decided to be facts in this proceeding and how were they discovered? What was decided in respect to the adjacent land and depreciation of it by severance from the land taken? What was decided in respect to the quantity of land owned by Mr. Appleby which was not taken and the effect upon it of taking the land under water? The determination must appear in the answers to the questions.

The opinion is not a substitute for the answers required by the Statute. Even in the opinion it is not clear what question of law was decided in answer to the question as to the amount of the award to which Mr. Appleby was entitled. It appears from the opinion that the Court thought the evidence in respect to value was conflicting. It did not have power to determine upon conflicting evidence what the *fact* was so as to be able to say as matter of law whether Mr. Appleby was or was not entitled to an award of more than six cents. (Page 128). If it was a fact that the value of the property was more than nominal, he was entitled to more than a nominal award.

If the Court had followed its decisions in other cases, the reasons given for reversal of the order of the Appellate Division would have constrained it to dismiss the appeal.

Matter of Westerfield, 163 N. Y. 210.

Malone v. Sts. P. & P. Ch., 172 N. Y. 269, 279.

Commercial Bank v. Sherwood, 162 N. Y. 316, 317.

Lewin v. Lehigh V. R. Co., 169 N. Y. 336.

Matter of Gibson, 195 N. Y. 466.

Matter of Thorne, 162 N. Y. 238.

Chapman v. Comstock, 134 N. Y. 509.

The Appellate Division had power to overrule the commissioners and Special Term on the facts and did so. If there was evidence to sustain the decision of the Appellate Division on the facts, its decision was conclusive and the Court of Appeals had no jurisdiction to review it. The Court of Appeals did not have jurisdiction to overrule the Appellate Division on the facts on the ground that there was some evidence to sustain the finding of the commissioners, if there was also evidence upon which the Appellate Division might reach a different conclusion. Findings of fact by the commissioners would not be effective if the Appellate Division disapproved them, but the commissioners found no facts and failed even to state the grounds their report, and the Appellate Division reversed the order confirming it, thus destroying all effect it might have had if confirmed.

XXIX.

The first question certified was a mixed question of law and fact and neither of the questions is such as the Court of Appeals had power to review.

Whether Charles E. Appleby, as surviving trustee of the Ogden Land Company, under the facts in this proceeding, is *entitled* to an award of more than six cents damages on the City of Buffalo acquiring the fee to the lands under the waters of Buffalo River in eminent domain proceedings, depends, *first*, upon the legal right of the owner of property taken for public use to compensation, and the standard by which the compensation shall be measured. Those are questions of law. Then comes, *second*, the question of value of the property; *third*, ownership of it; *fourth*, ownership of adjacent property and damage to it by severance, all of which must be considered in arriving at the *amount* of the award to which the owner is *entitled*. There is also the question as to what effect the purpose for which the property is taken has upon the amount of compensation.

It is settled by authority that the compensation to which the owner is entitled is the *value of the property* taken, without deduction for benefits from the purpose for which it is to be used, (190 N. Y. 350, *infra*.) and, if he owns adjacent property which is diminished in value by severance from the property taken, to a sum sufficient to cover his loss occasioned by such severance.

Henderson v. N. Y. C. R. R. Co., 78 N. Y. 433.

Matter of Utica, etc., R. R. Co., 56 Barb. (N. Y.) 456.

Matter of City of N. Y., 190 N. Y. 350.

South Buffalo Ry. Co. v. Kirkover, 176 N. Y. 301.

The value of the property taken is not a question of law which has arisen and ought to be certified for review by the Court of Appeals. How much adjacent property the owner had and how much the owner's adjacent property is diminished in value by the severance is a question of fact and not exclusively "a question of law which has arisen and ought to be reviewed by the Court of Appeals."

The question of law, which entitles the owner to compensation when his property is taken for public use, is settled by authority and the Constitutions of the State of New York and the United States and is not a question of law which "has arisen" that ought to be reviewed by the Court of Appeals, so as to come within the intent of subd. 2 of Sec. 190 of the Code.

By Sec. 9 of Article 6 of the State Constitution, the jurisdiction of the Court of Appeals is limited to the review of questions of law; the Code of Civil Procedure does not authorize anything but questions of law to be certified for review, and subd. 3 of Sec. 191 of the Code also limits the jurisdiction of the Court to a review of questions of law.

It is settled in both the State and United States Courts that under provisions allowing questions of law to be certified for review, mixed questions of law and fact cannot be reviewed.

United States v. U. P. R. R. Co., 168 U. S., 512.

Matter of Westerfield, 163 N. Y. 209.

Malone v. Sts. Peter and Paul's Ch., 172 N. Y. 269.

The questions certified can in no sense be treated as stating distinct propositions of law and the certificate should have been dismissed.

Cross v. Evans, 167 U. S., 60, 65.

If the question is intended to ask in respect to the *title* of Charles E. Appleby, that involves questions of fact, and raises a question which cannot be litigated in this proceeding, which is *one of appraisal and not of title*.

In Re City of Yonkers, 117 N. Y. 572.

Village of Olean v. Steyner, 135 N. Y. 344.

Point XVI *supra*.

The record states that he is the owner. (P. 37).

What question of law was determined by an answer of the question in the negative cannot be discovered.

What is said in respect to the first question applies equally well to the second.

The third question was not answered, but if answerable, should have been answered in the negative and resulted in dismissal of the proceeding.

Code C. P., Sec. 3360 subd. 3.

XXX.

The fourth question—"Did any of the exceptions call for a reversal of the order confirming the appraisal commissioners' report?" does not present "A distinct point or proposition of law, clearly stated, so that it could be answered without regard to the other issues of law in the case."

It is not a question of law only, but a mixed question of law and fact, and involves and implies a conclusion or judgment upon the weight or effect of testimony or facts adduced in the case. None of the exceptions are stated in the question and there was *no distinct proposition of law* specifically stated or embodied in the question. The whole record must be searched for the exceptions and the evidence examined to determine their materiality.

The exceptions include more than one proposition. There is first to be considered whether the decision excepted to was erroneous and if it was there follows an examination of what was done under the erroneous ruling and the evidence and other rulings in the case have to be examined to determine the materiality of the error. There were many exceptions, each presenting different propositions of law so that it cannot be said that the fourth question presents a distinct proposition of law clearly stated so that it can be distinctly answered without regard to the other issues of law in the case or that it is not a mixed question of law and fact and does not require a judgment or conclusion on the weight or effect of testimony or facts adduced, and of questions not certified.

Fire Ins. Assoc. v. Wickham, 128 U. S., 426, 432.

There were many exceptions that are stated in the Assignment of Errors which called for a reversal of the order confirming the report. The report was excepted to on the ground that the owner was entitled to substantial damages and the sum awarded was only nominal, and that the report was contrary (repugnant) to and in violation of the Constitution of the United States and the State Constitution, and was contrary to law and the facts. It was proved

that the owner had substantial rights that entitled him to a substantial award as matter of law. It was conceded that he was owner of the land. That entitled him to a substantial award. The exception called for a reversal of the appraisal commissioners' report and it was error to answer otherwise (Matter of City of N. Y., 190 N. Y., 350), but the questions arising under that exception were not distinctly presented by the question certified. Other exceptions to the admission and exclusion of evidence and rulings of the commissioners had a bearing upon the exceptions to the commissioners' report, which were not presented by the question "as a distinct point or proposition of law, clearly stated."

The owner excepted to the ruling of the commissioners upon the objection taken to the *jurisdiction of the commissioners to try the title* and to the receipt of evidence to establish grounds for an award of less than the value of the property taken. The erroneous rulings were grounds for setting aside the report.

Troy & B. R. R. Co. v. N. T. Co., 16 Barb. (N. Y.) 100.

Matter N. Y. C. & H. R. R., 15 Hun (N. Y.) 63.

Matter Water Commissioners, 96 N. Y. 351, 361.

The exceptions presented numerous grounds for reversal. They were not stated in the question. The question was not such that a distinct proposition of law could be definitely answered on one of the exceptions, without regard to other issues of law or fact in the case.

The answer given was erroneous and does not disclose what propositions of law were decided.

The same questions arise under the exception to the report on the ground that the owner was entitled to substantial compensation and the sum awarded was only nominal, as under the first question, whether or not the owner was entitled to more than six cents damages, and what is said in respect to the first question applies to this one.

What question of law was decided by an answer of that question in the negative?

The exceptions to admission and exclusion of evidence, of which there are many, require a review of the facts and evidence and of the evidence admitted, to decide upon their materiality. If the owner may have been injuriously affected, the report should have been set aside.

16 Barb., 100, *Supra*.

"The questions which were excluded related to it (the just compensation) and those which were received tended to subvert that right."

Matter Water Com'rs, 96 N. Y. 351, 361.

The exceptions to the jurisdiction of the commissioners *to try the title and to the receipt of evidence to establish grounds for an award of less than the value of the property taken*, seem to be well taken, but no mention of them can be found either in the decision or the opinion. They involve a review of the evidence and facts. The exceptions raise many points and propositions of law which could not properly be grouped in the general question—"Did any of the exceptions call for a reversal of the order confirming the appraisal commissioners' report" and a general negative answer gives no information as to the points actually considered or the questions of law decided.

The question was not such as the Appellate Division was authorized to certify, or the Court of Appeals to review.

Code C. P., Sec. 190, subd. 2.

Felsenheld v. U. S., 186 U. S. 125, 134.

United States v. U. P. R. Co., 168 U. S. 512.

Graver v. Faurot, 162 U. S. 435.

Matter of Westerfield, 163 N. Y. 209.

Malone v. Sts. P. & P. Ch., 172 N. Y. 269.

Cross v. Evans, 167 U. S. 60.

Quinlan v. Green Co. Ky., 205 U. S. 410.

In Quinlan v. Green County (Ky.) (205 U. S., 410), it is held: "Where a question certified by the Circuit Court of Appeals contains *more than a single question or proposition of law*, it will not be answered by this Court."

There were exceptions that both authorized and called for reversal of the order of confirmation as pointed out in this brief. Exceptions were taken to rulings of the commissioners and to the report and confirmation of the report was opposed on the exceptions.

The opinion does not state what exceptions, if any, were considered. If exceptions had been stated separately in questions, possibly there would have been answers showing what questions of law were decided. There were very material exceptions, which the owner's counsel specified in his brief and oral argument, and appear in the record, and are pointed out in the Assignment of Errors.

The plaintiff in error was prejudiced by the admission of maps objected to as incompetent. (Assignment of Errors, No. 12, page 150) Lots as laid down on them appeared to be bounded by the stream and they were expressly offered to show that land conveyed by the Ogden Land Company abutted on the river. Record 92. The plaintiff in error was entitled to damages caused by severance of the land taken from his adjoining land. Those maps (See point XVIII). were made the basis for the claim that the owner of the land under water had no adjacent land and that there were adjacent land owners who had easements in the stream which diminished the value of the owner's title.

The maps were unauthenticated. Neither the trustee of the Ogden Land Company, nor any one through whom he derived title, ever executed any conveyance with reference to those maps. *The maps were not made by his authority,* and they were incompetent against him. *They were proved to be incorrect* but the commissioners received them as competent and are presumed to have given them weight in accordance with their rulings admitting them as evidence. (Page 100).

Exhibit No. 2 purported to be a copy of an atlas made by Tobias Witmer, (Page 94). No conveyance made by the Ogden Land Company or its trustees refers to that map. Exhibit 6 does not purport to have been made for the Ogden Land Company (Pages 118-119). No conveyance by the Ogden Land Company or its trustees refers to that map.

The question in behalf of the owner, to his witness Ely, as to the sale of a canal to the Lehigh Valley R. R. Co. was competent, as tending to show that such property had market value. It was property under water in the vicinity and the marketability of such property was a subject of inquiry. The commissioners erroneously excluded it. (Page 53).

The exception to the ruling was well taken.

The Law member of the Commission asked John Otto, a witness for the owner, this question—"Assuming that this is a public highway and that the only interest that the person had in whom the title is, is the *SAME AS THAT OF ANY OTHER CITIZEN, SAME AS YOUR INTEREST*, the right to go in and upon it, what would you say then was the value?" Counsel for the owner objected to

the question and excepted to the ruling admitting it (Pages 46-47).

The exception was well taken. There was no ground for such assumption in the proofs. The title was not triable in the proceeding, and the proceeding was to take the land in fee simple, which includes all interests.

In Matter of Board of S. O. (27 N. Y. App. Div. 265; aff'd 158 N. Y. 721), it is held: "The owner of the fee of the land subject to an easement, and the owner of the easement, are together the 'owners' of the land."

The question and ruling show how the commissioners arrived at the conclusion that the trustee of the Ogden Land Company was entitled to only six cents for his interest, though the property was worth more, and that the commissioners adopted a wrong theory and applied a wrong principle in making their award. By reason thereof their award is insufficient.

The answer of the witness was correct—"I think the value is the same but I don't know who would get the money. I think the value is just the same—the land is there." The witness was testifying to the value of the land—not the title.

The commissioners could not divest themselves of the idea that they were trying the title and deciding what the title was worth, instead of appraising the property. The City's testimony was based upon the idea that the title could be controverted and was not good enough to entitle the owner to the value of the property, and that the property could be taken for nothing if Mr. Appleby's title was not proved. Their testimony on cross-examination showed that the property was valuable if the title was good.

The appeal should have been dismissed by the Court of Appeals because the questions were not such as it had power to review.

If any of the questions were answerable the answers should have been in favor of Mr. Appleby, the respondent, and the Court erred in answering them otherwise.

Each exception presented a different question of law and required a separate question to come within the rule that each question must be a distinct point or proposition of law, clearly stated, so that it could be definitely answered without regard to the other issues of law in the case.

United States v. U. P. R. Co., 168 U. S. 512.

There were many exceptions presenting different questions of law and the question should have been so framed as to require a decision of each without regard to the others.

By the fourth question, questions of law were not specifically propounded. The question was not such as the law allows and the certificate should have been dismissed.

United States v. U. P. R. Co., 168 U. S. 512.

The report of the commissioners was excepted to on the ground of its repugnancy to the Constitution of the United States, and its confirmation was opposed on that ground. To the question whether any of the exceptions called for a reversal of the appraisal commissioners' report, the Court simply returned an answer in the negative, without stating why or any specific question of law upon which its conclusion was based.

Did they decide that a report which was repugnant to the Constitution of the United States was valid and ought not to be reversed, or that a report founded upon a trial of title, which the commissioners had no authority to try and upon incompetent evidence received to establish grounds for an award of less than the value of the property taken, which was duly excepted to, was due process of law? If so, on what propositions of law did they reach that conclusion?

The Constitution requires due process of law which requires due compensation and conformity to regulations made for the protection of the property owner. The exceptions raised all those questions and the award was contested through all the Courts on the ground that it conflicted with the Constitution of the United States.

The answer to the question does not disclose the ruling of the Court upon any proposition of law upon which a negative answer to the question might be based, but it necessarily included a decision adverse to the plaintiff in error on the exception to the report on the ground of its repugnancy to the Constitution of the United States, as it affirmed the order of the Special Term, which recites that the exceptions to the report were read in opposition to its confirmation.

XXXI.

The proceedings take the property in fee simple; the City becomes absolute owner with power to sell or dispose of it as it sees fit. In no contingency does it revert to the owner from whom it is taken, and the amount to which the owner was entitled is not affected by the purpose for which it is said to be taken.

Heyward v. Mayor, etc. 7 N. Y. 314.

Matter of Water Com'rs, 96 N. Y. 350 & other cases cited therein.

Matter of City of N. Y., 190 N. Y. 350.

Sec. 3370 of the Code prohibits any allowance or deduction on account of any real or supposed benefits which the owner may derive from the public use for which the property is taken.

The City did not intend to keep the property. It obtained an act of the Legislature authorizing *exchanges* for other property.

N. Y. Laws of 1901, ch. 199, inserts in Sec. 445 of the City Charter the following provision: " * * In case the City of Buffalo shall at any time abandon the public use of any lands appropriated by it for public use, *or shall be about to abandon such use*, the common council by not less than a two-thirds vote may authorize the conveyance under hand of the mayor and the corporate seal of said City of any such lands, or any part thereof so abandoned or about to be abandoned in *exchange for other lands of substantially equal value* required by said City for a like public use."

Became a law March 27, 1901.

Laws of N. Y. 1901, Ch. 199 (Page 106 of the Record & Resolution of the Common Council, Page 106).

This proceeding was started by a resolution approved by the Mayor January 10, 1901, (Page 3 of record). The City authorities in obtaining the amendment to the charter to enable it to exchange the lands it was about to acquire by this proceeding "for other lands of substantially equal

value" were not expecting to acquire the land for six cents. City's witness Griffin testifies: "I know of the act permitting the *exchange* of lands" (Page 71).

What was intended has been developed by a plan adopted to change the course of the river as shown by the published plan submitted herewith. That plan shows what may be done and in fact is intended to be done, so as to change the stream from its present course, leaving a large quantity of land now covered by water free from it. By the change, land now having water frontage will lose the benefit of it.

See Chap. 527, N. Y. Laws 1906.

In *City of Buffalo v. D. L. & W. R. R.*, 126 N. Y. App. Div., 125, 128, it is said: "The river ~~is~~ to be *made* navigable in fact involves a *change in its channel* to a distance of 500 feet northeasterly from where the bridge in question is located," and at p. 136; "The only plan presented by the plaintiff for straightening and enlarging the channel of the river provides for *altering its course* so that the channel at the point now crossed by the defendant's tracks *will not be used at all, but will be abandoned.*"

XXXII.

The owner was deprived of his "day in court" by the interpretation of the Court of Appeals given to the order and certified questions of the Appellate Division, and by the ordering of final judgment. By such interpretation the owner's right to a review of the facts by, and the exercise of the discretion of, the Appellate Division, and the review of the whole case was nullified and taken from him.

In *Spies v. Lockwood* (165 N. Y. 483-4) it was said: "It would not be fair to the respondent to have final judgment ordered against him, for by so doing, he would be deprived of his right to have the facts reviewed by the Appellate Division."

It was quite as unfair to the respondent in this case to have final judgment ordered against him by which he was deprived of the benefit of a review upon the facts by the

Appellate Division. The Court of Appeals could not decide what the evidence proved, if conflicting, and the respondent was entitled to a decision upon the facts by the Appellate Division before the cause was finally determined on a question of law dependent upon the facts. Their opinion shows, and the legal presumption is, that the Appellate Division decided that the value of the property was more than ~~the~~ nominal, but the Court of Appeals disregarded it, and deprived the respondent of the benefit of the findings and review by the Appellate Division.

For that reason, the judgment by which he was deprived of property was not due process of law and was unconstitutional. (Assignment of Errors, 1st, 2nd & 10th specif.; pp. 136, 147.)

The whole case did not come before the Court of Appeals. It had not been finally determined by the Court below. Special questions were certified and they only were brought up, as the Statute expressly declares. (Code Civil Pro. Sec. 190, subd. 2, of which a copy appears in point IV *supra*.) An appeal upon the whole case could not be taken until it had been finally determined by the Court below. (Code Sec. 190.)

The questions were framed without the owner's consent by the adverse party and, as construed by the Court of Appeals, were such as did not present the grounds upon which the cause was decided in his favor by the Appellate Division and omitted what entitled him to the order made in that Court. The Appellate Division decided the questions of value in favor of the landowner, as the opinion shows, but the Court of Appeals did not give the landowner the benefit of that finding. The fact should have been distinctly stated in the question so that the owner might have received the benefit of it. The Court of Appeals was not authorized to determine or decide anything but the questions and to certify its decision or determination of the questions to the Court below. The grant of power to it did not include authority to review or render judgment on the whole case. The owner, who was the respondent and would have been entitled to a dismissal of the appeal or to an affirmance on other grounds than

those included in the special questions, if there had been an appeal bringing up the whole case, was not, and could not be, heard on such other grounds; but final judgment was rendered against him on the whole case, though the whole case was not before the Court. *He was deprived of the entire benefit of the day he had in the Court below without being given another on more than a part of the case.* That was not the "day in Court" he was entitled to. He was entitled to a hearing and decision upon all questions of fact as well as of law, and to the benefit of all grounds upon which the order of the Appellate Division in his favor was or might have been granted.

Cobb v. Hatfield, 46 N. Y. 533, 538.

Mickee v. W. M. & R. M. Co., 144 N. Y. 613.

Bank of China v. Morse, 168 N. Y. 483.

Sands v. Crooke, 46 N. Y. 564.

Spies v. Lockwood, 165 N. Y. 483-4.

The Court of Appeals did not have before it and could not decide what Mr. Appleby was *entitled to* on the weight of evidence, or if the Appellate Division on the weight of evidence might have decided that the value of the property was more than nominal, or that it had discretion to grant a new appraisal. The owner's case was disposed of without the review of material questions to which the law entitled him.

Harris v. Burdett, 73 N. Y. 138-9.

The question asks if Mr. Appleby, "under the facts of the proceeding," was entitled to an award of more than six cents, and required a decision determining what the facts were. The question itself negatives the idea that the Appellate Division intended to exclude from consideration what it was authorized to find on the evidence. The question could not be answered without knowing what the facts were. The opinion shows that it did decide the case on the ground that the evidence proved that the value was more than nominal, but the Court of Appeals excluded that in its interpretation of the question, and did not give the owner the benefit of any determination of the questions of fact or matters of discretion.

Were there any doubt about the meaning of the question, the opinion may be referred to to explain it.

Pringle v. Long I. R. R., 157 N. Y. 100.

Matter of Kings Co. E. R. Co., 82 N. Y. 98.

Fisher v. Gould, 81 N. Y. 228.

The ruling of the Court of Appeals that the evidence was conflicting and that they could not say what the fact of value was, shows conclusively that they could not answer the question as to the amount of award to which Mr. Appleby was entitled under the facts of this proceeding without a statement of the facts found by the Appellate Division.

The owner did not have the benefit of a determination in respect to the value under the question as construed by the Court of Appeals or of any questions not certified.

XXXIII.

The judgment of the Court of Appeals should be reversed because it did not have jurisdiction to reverse the order of the Appellate Division or to render final judgment.

Continental Ins. Co. v. Rhoades, 119 U. S. 237.

Seneca Nation v. Appleby, 196 N. Y. 323.

Bigelow v. Foust, 9 Wall 339, 351.

Assignment of Errors, specif. 10th, p. 147.

The order of the Appellate Division was made in a special proceeding; it was not an order finally determining the proceeding and was not appealable.

Assignment of Errors, specif. 2, pp. 137-8.

In the Constitution of the State of New York, it is provided that appeals to the Court of Appeals can be taken as of right only from * * * orders entered upon decisions of the Appellate Division *finally* determining * * * special proceedings.

Art. 6, Sec. 9, N. Y. Constitution.

Matter of Gibson, 195 N. Y. 466.

Van Arsdale v. King, 155 N. Y. 325, 330.

Code of Civ. Pro. (N. Y.) Sec. 190.

Record, page 138 & Point XII.

Roe v. Boyle, 81 N. Y. 305.

Hoes v. Edison G. E. Co., 150 N. Y. 87.

Matter of Curtiss, 199 N. Y.

As an appeal from the order was prohibited, the Court did not have the order before it, either to reverse or affirm. Neither the whole cause, nor the order itself could be brought up by appeal and the Court could not make an adjudication upon them.

Where questions of law are certified for review under subd. 2 of Sec. 190 of the Code, the questions certified are brought up for review, *and no other*. That does not include the whole cause. The action of the Court of Appeals is limited to a decision of the questions and to certifying to the Appellate Division its determination upon the questions—something quite different from power to render judgment of reversal or to finally determine the proceeding in which there are questions of law and fact which have not been certified for review.

Authority to determine or decide special questions is quite other than that upon a general appeal by which the whole case is brought up with all the questions there are in it.

Commercial Bank v. Sherwood, 162 N. Y. 316, 317.

Young v. Fox, 155 N. Y. 615.

United States v. U. P. R. R. Co., 168 U. S. 512.

The difference between a general appeal and the certification of special questions for review is considered in the cases above cited and provisions of the code relating to them are set forth in Young v. Fox and commented on in the opinion.

The party prevailing in the Appellate Division is entitled to an affirmance if there is any ground upon which the decision might have been made.

Bank of China v. Morse, 168 N. Y. 483.

But where questions are certified, the Court can not review the whole case to ascertain whether there are other questions on which the decision might stand. It can only determine the questions and certify its determination upon them to the Court below. That does not intend a final disposition of the cause.

The Court assumed jurisdiction to dispose of the whole matter as upon a general appeal, though a general appeal must have been dismissed if taken, and did not give the land owner the benefit of grounds upon which he was entitled to a decision in his favor if the whole case had been before the Court.

On a general appeal, if it appeared that the Appellate Division erred on a question of law but that the party may have been entitled to the decision on other questions or the facts, the decision in his favor should not be reversed.

Mickee v. W. M. & R. M. Co., 144 N. Y. 613.

Harris v. Burdett, 73 N. Y. 138.

Snebly v. Conner, 78 N. Y. 219.

For a similar reason if the Court certified an immaterial question, or one that could not be answered, if the party may have been entitled to the decision on other questions or the facts, the decision in his favor should not be reversed.

Special questions not covering the whole case may leave others which should be determined before a final decision of the cause.

Pringle v. L. I. R. R. Co., 157 N. Y. 100.

Point VI, *supra*.

Any law or decision depriving him of the benefit of grounds upon which the judgment or order in his favor might stand, without an opportunity to be heard in support of such grounds, is not due process of law.

The judgment rendered by that Court finally determining the whole proceeding and adjudging costs against the then respondent, without its having the whole case before it, deprived him of property without due process of law and conflicts with Sec. 1 of the 14th Amendment of the Constitution of the United States. (Assignment of Errors, specif. 1, page 136 & specif. 2, page 137; also specif. 20, page 152.)

The Court disposed of the whole matter without having anything but special questions before it and the land owner was not heard in respect to more than part of what he was entitled to have considered.

Harris v. Burdett, 73 N. Y. 137-8.

Mickee v. W. M. & R. M. Co., 144 N. Y. 614.

Hoes v. E. G. E. Co., 150 N. Y. 89.

Hewlett v. Wood, 67 N. Y. 394.

Pringle v. L. I. R. R. Co., 157 N. Y. 100.

Albring v. N. Y. C. etc., 166 N. Y. 287.

“A judgment or an order may have been given or made upon several grounds, one of which may be incorrect, while all the rest are good. The practice adopted in this case

would permit the party defeated in the Court below to pick out all the weak propositions involved in the particular ground affected with error, ignoring all the other grounds * * * although the decision below may stand well upon all the other grounds."

"The spirit and purpose of the provisions of the Constitution and the Code, authorizing the Courts below to send appeals here on special questions, do not permit this practice and it ought not to be sanctioned."

Blaschko v. Wurster, 156 N. Y. 445.

That states clearly why judgments or orders should not be reversed on special questions. The questions may be answered, if they are such as the law permits, and the answers certified to the Court below for the instruction of that Court, whose province it is to render the judgment on the whole case.

Commercial Bank v. Sherwood, 162 N. Y. 316-7.

Where the Court has rendered judgment in addition to certifying answers to the questions, it has mistaken the spirit and purpose of the Code in allowing special questions of law to be certified for review and has exceeded the authority given by the letter of the statute, as well as its spirit.

No judicial decision or legislative enactment can be due process of law which excludes any ground upon which the respondent was entitled to the judgment in his favor; and he cannot be restricted to the questions arbitrarily certified for review, without depriving him of his fundamental right to maintain his judgment on any ground upon which it was properly rendered. The decision of the Court of Appeals rendering final judgment without having the whole case before them deprived the respondent of the right he had to maintain his judgment on other grounds than those covered by the questions, and was not the "due process of law" required by the Constitution of the United States.

The words used in the section indicate that the question is to be certified to the Court of Appeals while the case is *pending* in the Court below to aid it in the decision of the cause. The certificate is "that one or more questions of law *have arisen*," etc. That means that the questions are under consideration. If the certificate were to be made after judgment it would be "that one or more ques-

tions of law *arose*." To review the cause after judgment the review should cover the whole case without questions.

The Court of Appeals overlooked the fact that its jurisdiction ceased with the certification of its determination upon the questions to the Court below.

As it is expressly declared by the Statute that the appeal brings up nothing but the questions certified, the rest of the case remains with the Court below to whom answers to the questions are to be certified. The duty to determine the whole case on the facts and questions of law not certified rests with the Appellate Division, aided by the rulings on the certified questions.

Commercial Bank v. Sherwood, 162 N. Y. 317.

Harris v. Burdett, 73 N. Y. 137.

Mickee v. W. M. & R. M. Co., 144 N. Y. 614-5.

Hewlett v. Wood, 67 N. Y. 394.

This construction is in accordance with the language of the section and obviates the injustice of a determination of the case against the respondent on what may be weak points selected without his concurrence and against his objections, while there are good grounds for the decision in his favor which are not certified or brought up, and follows the rule respecting certification of questions for review to the Supreme Court of the United States, which the State Statute passed in 1895 was intended to follow.

Grannan v. Westchester Assoc., 153 N. Y. 449, 458.

The certificate of questions for review is to *aid* the Court below in its decision of the cause.

Commercial Bank v. Sherwood, 162 N. Y. 317.

To serve that purpose the questions must be certified while the cause is pending in the Court below. The Court below will not be aided in the decision of the cause if the cause is taken away from it and finally disposed of by the Court of Appeals.

The Court of Appeals did finally dispose of the whole proceeding and there was nothing left for the Court below except to enforce the judgment of the Court of Appeals.

Wilkins v. Earl, 46 N. Y. 358.

The remittitur of the Court of Appeals provided: "Did order and adjudge that the order of the Appellate Division * * be and the same hereby is reversed and that of the Special Term affirmed with costs in both Courts" (p. 130).

XXXIV.

The Court of Appeals erred in deciding that the order should be reversed on the ground that the evidence respecting value was conflicting.

The substance of the decision was that the evidence in respect to value was conflicting and it could not be said as matter of law what the value was and that the order should be reversed on that ground. (Opinion, page 127.)

In this Court, the certificate would have been dismissed, and the Court of Appeals in other cases where there were similar grounds, dismissed the appeal.

United States v. U. P. R. Co., 168 U. S. 512.

Matter of Westerfield, 163 N. Y. 209.

Malone v. Sts. P. & P. Ch., 172 N. Y. 269.

Reason and authority required dismissal instead of reversal.

The question must not be one covering the whole case though split up in the form of questions of law nor whether upon the evidence the judgment should be for one party or for the other.

United States v. U. P. R. Co., 168 U. S. 512.

Williamsport Bk. v. Knapp, 119 U. S. 357.

Cross v. Evans, 167 U. S. 60.

If the questions cannot cover the whole case nor ask whether the judgment should be for one party or for the other, it seems obvious that there should not be rendered a judgment for one party or for the other.

XXXV.

The questions were misinterpreted by the Court of Appeals. Their ambiguity and want of facts as a basis for any proposition of law confused the Court of Appeals and caused injustice to the owner. The certificate should have been dismissed.

Williamsport Bk. v. Knapp, 119 U. S. 357.

The first question asks if Mr. Appleby, as trustee, etc. was "entitled to an award of more than six cents" without

suggesting what propositions pertinent to the subject of inquiry there were that ought to be reviewed by the Court of Appeals.

The Court of Appeals construed the questions as an inquiry in respect to the conclusiveness of the evidence (Opinion 137) though there is nothing in the questions or the opinion to indicate that the propounders of the question had that in mind. It was for the Appellate Division to determine what the evidence proved. Its duty could not be transferred to the Court of Appeals and it is unreasonable to suppose that it intended to do so. The question asks as to the *amount* of award to which Mr. Appleby was entitled and is a question quite different from such an inquiry as the Court interpreted the question to be. Mr. Appleby was entitled to an award of the value whatever it was, whether the evidence was conflicting or not. The Appellate Division had to settle that question. The Court of Appeals could not deal with it.

Tousey v. Hastings, 194 N. Y. 79.

Cases cited under Points VIII, XI, XII.

Matter City N. Y., 190 N. Y. 350.

The opinion of the Appellate Division shows that it decided that the property had substantial value and that its value was more than nominal. That was for it to decide and not for the Court of Appeals. The opinion may be referred to to explain an ambiguity.

Fisher v. Gould, 81 N. Y. 228.

Pringle v. Long Island R. R., 157 N. Y. 100.

The opinion of the Appellate Division shows that it regarded the *fact of value as established*. It did not regard it as "a question of law that has risen which ought to be review by the Court of Appeals" (Code Sec 190 subd. 2).

It does not sustain the Court of Appeals in its interpretation. That the property had substantial value (p. 122) was one of the "facts in this proceeding," on which the question was based as the opinion shows.

XXXVI.

The Court of Appeals doubted the correctness of their interpretation of the first two questions and erred in their conclusion that they might reverse the Appellate Division if they decided the fourth question in the negative without answering the first two.

It is said in the opinion: "If we should conclude that questions one and two do state *questions of fact* which cannot be considered by us, then treating the third question as immaterial, we should have left for our consideration simply the fourth question, and there being no exceptions which call for a reversal of the order confirming the commissioners' report, we should in this manner likewise come to the conclusion that the order appealed from should be reversed." (Page 128.) That conflicts with the case of *Albring v. N. Y. C. & H. R. R. Co.*, 166 N. Y., 287 and many other cases. Questions which left the fact of *value* and matters of *discretion* out of consideration omitted what was material to a decision of the case.

In *Downing v. Kelly*, 48 N. Y., 434-5, it is said: "Where the return shows that questions of fact were legitimately before the General Term, and that the evidence was such that the Court may have reversed the judgment on the facts, it is impossible to say from an inspection of the record, that they committed an error of law in granting a new trial, though we should be of the opinion that none of the exceptions were well taken."

The order was not shown to be erroneous by showing that there was no valid exception in the case, provided it was in such a condition that the Appellate Division could have reversed on the facts.

Snebley v. Conner, 78 N. Y. 219.

Harris v. Burdett, 73 N. Y. 138.

Downing v. Kelly, 48 N. Y. 434-5.

If there had been no exceptions requiring a reversal by the Appellate Division, their order of reversal was prop-

erly made on the facts and in their discretion and should not have been reversed on the ground that there were no exceptions to sustain it.

Brennan v. City of N. Y. 123 (N. Y.) App. Div. R., 10 and 11.

Opinion by Mr. Justice Gaynor, citing and reviewing cases.

The City took no exceptions and there were none on which it was entitled to reversal.

By his appeal to the Appellate Division, the defendant was entitled to have that Court pass upon the facts.

Mickee v. W. M. & R. M. Co., 144 N. Y. 614.

Harris v. Burdett, 73 N. Y. 136.

The evidence was such that the Appellate Division might properly reverse the order of the Special Term and the Court of Appeals did not have jurisdiction to reverse a decision made on the facts, as well as the law.

Points IV, XII, XIV, XV and XVII, *Supra*.

For a review of the decision of the Appellate Division on the questions, the facts found by it should have been stated in the questions.

According to the opinion of Mr. Judge Hiscock, there were questions of fact and matters of discretion, which it was the duty of the Appellate Division to decide, upon which that Court might have made its order, and its order should not have been reversed when there were such grounds for it.

Cobb v. Hatfield, 46 N. Y. 538.

Harris v. Burdett, 73 N. Y. 136, 139.

Mickee v. W. M. & R. M. Co., 144 N. Y. 613, 615.

The Appellate Division did not certify a question asking if it was conclusively proved that the value was more than nominal. It decided that for itself and needed no aid on that proposition from the Court of Appeals and did not ask for it. The Court of Appeals was limited to a review of the questions certified.

If the value of the property was more than nominal, the award should have been more.

XXXVII.

If the questions certified were such as the Court of Appeals could not review that was ground for dismissal, not for reversal.

Malone v. Sts. P. & P. Ch., 172 N. Y. 269.

United States v. U. P. R. Co., 168 U. S. 512.

Matter of Westerfield, 163 N. Y. 209.

Jewell v. Knight, 123 U. S. 426, 432.

The Court of Appeals did not have the whole case and its jurisdiction did not include the right to reverse the order of the Appellate Division.

Points XXIV and XXV, *Supra*.

It failed to consider the limitations upon its authority.

The decision of the Appellate Division should stand if it was right on any ground.

Mickee v. W. M. Co., 144 N. Y. 614.

Matter of S. B. R. R. Co., 128 N. Y. 93.

Bank of China v. Morse, 168 N. Y. 459.

Lewin v. L. V. R. R. Co., 169 N. Y. 338.

Brennan v. City of N. Y. 123 App. Div., 7.

Harris v. Burdett, 73 N. Y. 136.

Chapman v. Comstock, 134 N. Y. 509.

The order of the Appellate Division is presumed to have been made upon any grounds upon which it was proper to make it, including discretion, and was not reviewable or reversible by the Court of Appeals. (Point IV, XII, *Supra*.)

Brennan v. City of N. Y. 123 App. Div. R., 7.

Lewin v. L. V. R. R. Co., 169 N. Y. 338.

Schneider v. City of Rochester, 155 N. Y. 619.

Matter of Kings Co. El. Ry. Co., 82 N. Y. 98.

Allen v. Meyer, 73 N. Y. 1.

XXXVIII.

There was no proposition of law distinctly stated.

Even the Court of Appeals did not discover in the first two questions "at first sight" the proposition which they

finally concluded was embodied in them, and it may be inferred from the opinion, as the fact was, that the parties had not called attention to such a proposition, because they did not know it was there and thought the questions meant something else, as they do.

Opinion, page 137.

189 N. Y. 167-8.

The question was faulty in that respect.

Williamsport Bk. v. Knapp, 119 U. S. 357.

When it became known that the questions were misconstrued, the respondent's counsel made a motion for re-settlement, but the motion was denied. (Record, page 129.)

It was the province of the Appellate Division to settle the facts. The Court of Appeals did not have power to deal with them.

Tousey v. Hastings, 194 N. Y. 79, 82.

As interpreted, the questions called upon them to review the evidence and exercise judgment upon its force and effect, and do what the law required the Appellate Division to do, and had done before asking if under the facts the land owner was entitled to an award of more than six cents, as their opinion and decision show.

The questions, whether construed according to the usual meaning of the words or as the Court of Appeals interpreted them, are not questions of law, clearly stated, but are mostly questions of fact, which the law does not authorize.

Code C. P. Sec. 190, subd. 2.

United States v. U. P. R. Co., 168 U. S. 512.

The answer given to the question, as it appears in the record, does not state the proposition, which from the opinion it seems the Court intended to decide. It would not be discovered from the question and answer without reference to the opinion, that the decision was that there was a conflict of evidence and that it could not be said as matter of law that Mr. Appleby, as trustee of the Ogden Land Company, was entitled to more than nominal damages; nor would it appear that that was a sufficient ground for reversal of the order of the Appellate Division. It was the duty of the Appellate Division to decide on the evidence what the fact was, whether there was a conflict or not, and it is to be presumed that they did and that their

question "upon the facts of this proceeding" was based upon all facts warranted by the evidence in favor of the party who prevailed before them. Without the facts determined by the Appellate Division on the evidence, if conflicting, there was no question of law for the Court of Appeals.

The commissioners were not the whole tribunal. Their report could not become of force until confirmed by the Supreme Court, of which the Appellate Division was an important part, with discretionary power to refuse to confirm it "when they deem it as matter of fact, improper, inexpedient and impolitic to do otherwise," and their discretion was not reviewable.

Matter of Kings Co. El. Ry. Co., 82 N. Y. 95, 98.

Martin v. Windsor Hotel Co., 70 N. Y. 103.

And "the Court of Appeals was bound to suppose that the Appellate Division examined the case before it upon the matters of fact involved, as well as upon the questions of law presented, and based the order made upon conclusions drawn from the former, as well as the latter." *Idem*.

In Hoes v. Edison Gen. E. Co., 150 N. Y. 89, it is said: "If this Court should reverse the General Term and affirm the judgment of the Trial Court, the defendant would have a judgment against it without having the question whether the verdict was against the weight of evidence considered."

That is what happened in this case by the construction put upon the questions and the decision upon them and it is a very good reason for believing that the interpretation of the questions was incorrect, and the decision upon them erroneous.

The Appellate Division on the evidence properly decided that the value of the property was more than nominal, as it might whether the evidence was conclusive or conflicting, and in their question assumed that that was a fact in this proceeding. They were right and should have stated the fact in the question. But, if they erred as to the conclusiveness of the proof, the weight of evidence was such that the decision that the value was more than nominal was correct. By the ruling of the Court of Appeals, the owner lost the benefit of a review of the evidence by the Appellate Division which he was entitled to (C. C. Pro.,

3377) and of a decision by it in respect to the facts which should be found upon the evidence.

The order of the Appellate Division should not have been reversed unless no construction which might be given to the facts would justify the order.

Allen v. Meyers, 73 N. Y. 1.

Sanford v. Eighth Ave. R. Co., 23 N. Y. 343.

The questions, if they were such as it was proper to certify for review, should have stated the facts found by the Appellate Division. Without a statement of them, they must be assumed to be all that the evidence warranted if they can be looked for outside of the certified questions.

To cover the land owner's case, there should have been questions asking if the Appellate Division had discretionary power to grant a new appraisal and if the evidence was such as to authorize its exercise, as well as all other questions upon which the Appellate Division was authorized to reverse the order of the Special Term, before rendition of final judgment.

XXXIX.

The Court of Appeals was not justified in interpreting the questions as the opinion shows that they did, nor in reversing the order of the Appellate Division on such an interpretation if correct.

It is said in the opinion: "We have concluded that we may *interpret* them as propounding the inquiry in substance whether as matter of law the *evidence* presented to the commissioners entitled the respondent to an award of more than nominal damages." (127.)

What the evidence proved if conflicting was a question of *fact* which the Appellate Division could decide but the Court of Appeals could not.

The Appellate Division said: "We think the citation of authorities is unnecessary to demonstrate that the appellant was the owner of valuable property which consisted of the bed of the Buffalo River. The *evidence* shows conclusively that such property is valuable. We think it cannot be reasonably contended that the ownership of the fee

of the bottom of Buffalo River is not as to the owner a valuable property." (Opinion, page 122.)

The latter were the tribunal authorized to pass upon the *weight of evidence* and decide what facts were proved by it, and it is unreasonable to suppose that they intended to certify as a question of law which had arisen that ought to be reviewed by the Court of Appeals an inquiry as to the force and effect of the evidence, especially as that Court did not have power to determine questions of fact. The Appellate Division decided the question of fact on the evidence as they should, and the Court of Appeals misinterpreted their questions.

In *Brennan v. City of N. Y.*, 123 N. Y. App. Div., 7, Mr. Justice Gaynor, held: "In order that the order of reversal of the Appellate Division *may be appealable* to the Court of Appeals, it must *affirm on the facts*. * * * Either in so many words, or in some equivalent way * * * such as * * * the order 'is reversed on exceptions only, *the facts having been examined and no error found therein.*'"

On p. 9 Mr. Justice Gaynor says: "If the case could go up on appeal from us in that condition, and our order should be reversed and the judgment of the Trial Court reinstated, the respondent would thus finally *lose without having had such other questions, including the question of the weight of evidence, reviewed by us at all.*"

That was the result in our case. Under the interpretation given to the order of reversal by the Court of Appeals, we have lost without the benefit of a review by the Appellate Division of "such other questions, including the *weight of evidence.*"

If the questions had been as the Court construed them and they had decided as their opinion shows they did, that there was conflict of evidence and for that reason they could not determine what the value of the property was, and they could not say as matter of law on the evidence that the owner was entitled to more than a nominal award, on answering in the negative the questions as they interpreted them, they should have remitted the cause to the Appellate Division for a decision of the facts, to which he was entitled, if they did not dismiss the certificate and appeal.

Pringle v. L. I. R. R. Co., 157 N. Y. 104.

Hewlett v. Wood, 67 N. Y. 394.

Matter of City of Buffalo, 68 N. Y. 170.

It was not fair to order a final judgment against the property owner without a decision upon the facts.

Spies v. Lockwood, 165 N. Y. 483-4.

In the matter of Westerfield, 163 N. Y. 210, a similar question was interpreted differently and the appeal was dismissed.

If a general appeal could have been taken from the order, bringing up the whole case, the Court of Appeals would not have been authorized to reverse the decision of the Appellate Division made upon the facts if the evidence was conflicting.

Allen v. Meyer, 73 N. Y. 1.

Schryer v. Fenton, 162 N. Y. 444.

Schofield v. Hernandez, 47 N. Y. 313.

Cases cited under Points XI and XII.

What can not be done on the whole case should not be done on part of it.

The words used in the questions do not express such a meaning as the Court of Appeals imputed to them.

The ample power vested in the Supreme Court to review the proceedings and report of the commissioners, which was without force until confirmed by the Court, and to grant a new appraisal in its discretion (Code C. P. Sec. 3377), precludes the idea that the Appellate Division intended to evade the duty of determining the facts and exercising the discretion reposed in it and shift its duty to the Court of Appeals, which did not possess such jurisdiction, or to make the case turn on the question whether as matter of law there was any evidence to sustain the award, no matter how great the preponderance of evidence was against it. (Matter of Kings Co. El. R. R. Co., 82 N. Y. 98-9) but that is the effect of the interpretation of the question and the judgment of the Court of Appeals upon it as thus interpreted. It is an unreasonable interpretation. The owner was entitled to a review upon the facts which the Appellate Division could give him but the Court of Appeals could not.

The questions asked for an opinion on the "facts," not the evidence. The words *facts* and *evidence* do not mean the same thing. "*Fact*—reality; truth; witnesses are in-

roduced into Court to prove a fact." (Webster)

"Facts constituting a cause of action" are "those *facts* which the evidence upon the trial will prove, and not the evidence that will be required to prove the existence of the *facts*."

Clay County v. Simonson, 1 Dakota, 413.

Lackey v. Vanderbilt, 10 How. Pr. (N. Y.) 168.

Boyce v. Brown, 7 Barb, (N. Y.) 80, 85.

Where the judge before whom issues are tried is required to make a decision containing findings of *fact*, a report of *the evidence* is insufficient. The judge must find the fact which he decides the evidence proves.

Dougherty v. Lion Fire Ins. Co., 183 N. Y. 302.

It is said in Ram on Facts, p. 5: "That a fact once in complete existence, once ended, admits of no addition, no subtraction, once in evidence it is irrevocable. Not so with evidence tending to *prove a fact*. It may be added to or subtracted from, weakened, strengthened or destroyed. * * * So that it may be conceded that a *fact* is one thing and evidence is quite a different thing."

The questions of law that may be certified for review must be based on fundamental facts, not evidential facts.

Sigafus v. Porter, 85 Fed. R., 684.

"Where a controversy, submitted upon an agreed statement of facts under §1279 of the Code of Civil Procedure, presents a pure question of law, the Supreme Court has power to decide it, and the Court of Appeals may review its decision; but if the question of law cannot be decided without first disposing of conflicting or equivocal inferences of fact, the Supreme Court is without jurisdiction, and a judgment entered upon such a decision must be reversed and the proceeding dismissed."

Marx v. Brogan, 188 N.Y. 431.

value was more than nominal.

Mickee v. W. M. & R. M. Co., 144 N. Y. 615.

The owner was entitled to a decision upon the evidence by the Appellate Division but was deprived of it by the

construction put upon the questions by the Court of Appeals.

If the Court doubted the adequacy of the award, it had discretionary power to grant a new appraisal, (Points XXII & XXIII) and its discretion was not subject to review. (Point XII.)

It should be presumed that the Appellate Division understood what was meant by "facts" when it certified the question—"Is Charles E. Appleby, as surviving trustee, under the *facts* in this proceeding, entitled to an award of more than six cents" etc. It had examined the evidence and said—"The evidence shows conclusively that such property is valuable * * that it is more than nominal is conclusively established * * * that it has an intrinsic value cannot under the evidence be doubted." That the value of the property was more than nominal was a "fact" in the proceeding, as the propounder of the question repeatedly said.

They meant *facts* and not evidence, but their question was defective because a statement of the facts was not in it, and the Court of Appeals had no power to determine upon the evidence what the facts were, and, in effect, said so.

It was settled that the facts to be certified are fundamental facts and not evidential facts, and it should not be presumed that the Appellate Division meant to ask for a ruling as to the weight of evidence.

In any view that can be taken of the question, it was not such as was permissible by the Statute. The Appellate Division had power and it was its duty to decide on the evidence what the facts were and should have stated them in the question and not invited the Court of Appeals to search the entire record for them, especially as that Court did not have power to deal with the facts.

United States v. U. P. R. Co., 168 U. S. 512.

Cross v. Evans, 167 U. S. 60, 65.

If the Court of Appeals disagreed with the Appellate Division as to the facts being conclusively established and decided that different inferences might be drawn from the evidence and that there was a question of fact that it could not review, the appeal should have been dismissed.

Matter of Westerfield, 163 N. Y. 209.

Malone v. Sts. P. & P. Ch., 172 N. Y. 269.

In *Harris v. Burdett* (73 N. Y. 136) it is said: "Suppose this Court should differ with the General Term upon the question of law on which its order for a new trial was founded, what judgment should we render? * * The questions of fact were brought legitimately before the General Term and it must be presumed that it would have passed upon them, had it not been of opinion that the point of law required a reversal."

The Court held that if there was any controverted question of fact involved and the general term might have granted the new trial upon such question of fact the order was not appealable, and that it would not be appealable, although it should conclusively appear that the decision was based upon questions of law only.

XL.

The Court of Appeals can only answer the questions. It has no further jurisdiction.

N. Y. Const., Art. 6, Sec. 9, C. C. P. 190.

If the Court of Appeals might interpret the question as asking as to the effect or weight of the evidence so that it might answer that the evidence was conflicting and it could not be said as matter of law what it proved, on returning that answer to the Court below, that Court might then pass upon the weight of evidence and render its decision upon that. The Court of Appeals should not have rendered judgment on the whole case.

Such an answer would not show that the order of the Appellate Division ought to be reversed.

Pringle v. L. I. R. R. Co., 157 N. Y. 104.

Snebley v. Conner, 78 N. Y. 219.

Hewlett v. Wood, 67 N. Y. 394.

Matter of DeCamp, 151 N. Y. 557, 564.

XLI.

The Assignment of Errors covers the question of insufficiency of the certified questions and want of jurisdiction of the Court of Appeals to answer them.

(Specif. 2, page 138-9; specif. 4, page 139; specif. 8, page 147.)

Specifications in the Assignment of Errors cover the errors of the Commissioners in the admission and exclusion of evidence, (Specif. 12, pages 148-150) their ruling upon the objection to the receipt of evidence to establish grounds for an award of less than the value of the property taken, (Specif. 2, p. 137 & 93) and the exceptions to the commissioners' report, on the ground of repugnancy to the United States Constitution.

Specif. 1 and 2, pp. 136, 137, 139 and specif. 7, fol. 281, p. 147, and specif. 20 allege that the decision of the Court of Appeals is repugnant to the clause of the 14th Amendment to the Constitution of the United States, which declares that no State shall deprive any person of property without due process of law.

XLII.

The reasons given by the Court of Appeals for their interpretation of the first two questions are not sound.

The opinion states as a reason for their interpretation "that the reversal by the Appellate Division must be deemed to be made as matter of law" and cites Secs. 1361 and 1338 of the Code of Civil Procedure to sustain that statement. *The Certificate did not include such a proposition.*

The rule is thoroughly settled the other way (Points XI and XII, *Supra*) and the sections of the Code cited do not apply to a case like this. Sec. 1338 applies only to Special Term judgments where there has been a trial of issues and there have been findings of fact and conclusions of law (C. C. P. 1022).

The learned judges inadvertently failed to distinguish between appeals from orders granting new trials in actions tried before the Court or a Referee and other appeals.

Dickson v. Broadway etc. R. R. Co., 47 N. Y. 511.
Allen v. Corn Ex. B'k., 181 N. Y. 278, 281.

In the *Chapman case*, (162 N. Y. 456) cited by the learned judge, the error complained of was in the proceedings before the *Appellate Division*, and Sec. 1361 was cited to show that appeals in special proceedings in *that*

Court are governed by the same rules as are appeals from judgments in actions. There was no question of presumption in the case. The appeal was from a *final* order where there was no *reversal* and was not affected by Sec. 1338. Its application to appeals to the Court of Appeals was not up for consideration. Sec. 1338 was not mentioned nor was the case in 128 N. Y. 98 *supra*.

The *Manhattan case* (165 N. Y. 305, 312) cited by the Court of Appeals, is not in point. It was a proceeding by certiorari to review an assessment under a special statute (Laws of N. Y., ch. 908, Sec. 196), in which *issues were tried before a judge in a Trial Court* and *findings* were made by him; and differs from an assessment of damages by commissioners, where there were no issues or trial before a judge or referee. The Court cited the Chapman case and Secs. 1361 and 1338, without noticing that the case cited did not hold that Sec. 1361 applied to proceedings in the Court of Appeals, and failed to consider the limitations of the sections cited, or the decision of that Court reported in 128 N. Y., 98, which holds that Sec. 1361 does not apply to appeals to the Court of Appeals, or the numerous other decisions referred to in Point XII, *Supra*, in respect to presumptions. The *Manhattan case* was treated as a general appeal and was not heard on certified questions though Sec. 190 did not authorize an appeal from an order granting a new trial in an action without a stipulation for judgment absolute, or from an order in a special proceeding that did not finally determine the proceeding.

The Sections cited are not in point nor is either of the cases where there was a trial of issues, before a judge or referee.

The Court of Appeals in a later case (*Matter of Gibson*, 195 N. Y., 466) decided that an appeal cannot be taken to that Court from an order granting a new trial in a special proceeding, and that such an appeal should be dismissed.

Under that decision, the *Manhattan case* and the other cases cited should have been dismissed.

Sec. 1338 does not apply to an appeal from an order that is not appealable. There is nothing making it applicable to any appeals but such as are taken in actions, where judgment has been entered upon a decision of a referee or Trial Court, before whom issues have been tried.

XLIII.

The Court was not justified in selecting Sec. 1338, relating to Appeals in actions and applying it to appeals in special proceedings, without applying the other provisions of the Code.

If, as the Court held in this case, appeals in special proceedings are governed by the provisions of the Code relating to appeals in actions, and the appeal was from an order granting a new trial so that Sec. 1338 applied, (Opinion p. 127) it follows that the provision of Sec. 190 requiring the appellant to stipulate that upon affirmance judgment absolute shall be rendered against him, also applied, and the appeal could not be taken without the stipulation. (Art. 6, Sec. 9 N. Y. Const. & C. C. P. 190). The order granting permission to appeal and certificate of questions for review did not confer jurisdiction, and the appeal should have been dismissed.

N. Y. C. & H. R. R. Co. v. State of N. Y. 166 N. Y., 286.

Mundt v. Glokner, 160 N. Y. 371.

XLIV.

The Court of Appeals erroneously attempted to exercise its judgment upon the testimony and was mistaken, not only as to the evidence in respect to value, but as to nearly every material fact in the case.

The opinion states—"There does not appear to be any dispute that either by him (Mr. Appleby) or by the company whose rights he represents, substantially all of the land abutting upon the river upon either side formerly owned by the company, has been conveyed away. *This is a matter of importance* as bearing upon the value of the bed of the stream, because if the bed and fee to the abutting lands were owned by the same party, *it very well might be* that the possible connected use of the two would be an element of much importance in passing upon the

value of the land."

The testimony of the witnesses showed that there was a demand for land under water from owners of uplands and from persons desiring both the uplands and lands under water, and many sales, and that the possibility of acquiring land under water by purchase enhanced the value of adjacent uplands. The possibility of connecting the two increased the marketability of both. Testimony of W. H. Slade, Record, page 44.

The learned Judge was mistaken in respect to the facts. Mr. Appleby did make proof that a substantial amount of adjacent land had not been conveyed and he contested the claim that he had parted with his rights in the property and proved it. What the facts were in respect to the title are not stated in the questions; none of the evidence relating to it is contained in the questions; and no distinct question of law based on it has been certified for review. The question was a mixed question of law and fact which the Court of Appeals did not have power to review. The owner objected repeatedly to trial of his title before the commissioners and to the deeds offered on the ground that they did not cover the property in question and to unauthenticated and incorrect maps, purporting to be based on several different surveys, which were incompetent, and excepted to the rulings of the commissioners in respect to them. (Page 92 to 101 and Assignment of Errors, specif. 12th, page 148.) They prejudiced Mr. Appleby before the Court of Appeals as well as before the commissioners.

Besides objecting to the evidence offered by the City, the *original* field notes of the survey laying the land out into lots and the *original* map according to the survey were produced and sworn to by Marsden Davy, who had them in his possession. The deeds when compared with his testimony and the original field notes and map showed that the lots conveyed did not abut on the river. (Testimony of Marsden Davey in the above statement of facts and in the record, page 102; Assignment of Errors, specif. 6th, page 144.)

Mr. Davey had surveyed lots according to the original field notes, (p. 162).

Mr. Davey testified to changes in the river which added

more land to the 12 to 15 feet left between the lot lines and the stream.

The assessors' map introduced in evidence in behalf of the City shows changes in the course of the river and that since the lots were laid out 12 to 15 feet from the margin of the stream, the changes have been such that in places 100 or more feet have been added. (City's Exhibit No. 6 between pages 118 and 119 of Record, and testimony as to width of river, p. 42.) City's Map Exhibit 2 (p. 118) showed the "land under water," not the lot lines (p. 38).

XLV.

The description of the lots in the field notes, the original map and the deeds are such that the owner did not convey interest in the river but had left an amount of upland which preserved the riparian rights.

Starr v. Child, 4 Hill 369 (N. Y.) cited *Matter of Brookfield*, 176 N. Y. 145.

Banks v. Colgate, 67 N. Y. 512, 516.

Lots conveyed according to Lovejoy & Emslie's survey did not abut on the river and no interest in it was conveyed. The lines began and ended at stakes which were 12 to 15 feet from the margin of the stream, at the date of the map, and more was added by accretion.

(Testimony of Marsden Davy, *supra*, & Record, fol. 187, p. 103.)

In *Starr v. Child*, 5 Denio 610, Senator Lott, delivering one of the prevailing opinions of the Court of Errors, cites *Angel on Water Courses*, p. 6, saying: "If the grantee is bounded by visible and durable monuments, as a tree, or a fence, near, but without the edge of the river, it is equally clear that he can claim no interest in the bed or water of the river."

In *Child v. Starr*, 4 Hill 374, Chancellor Walworth, in delivering the leading opinion of the Court of Errors, cited *Dunlap v. Stetson* (4 Mason Rep. 349) where the lands granted commenced at a stake and stones on the west bank of the Penobscot River, and after running on the other sides of the lot certain courses and distances to another stake and stones on the same bank of that

river, and thence upon the bank at highwater mark, to the place of beginning. Judge Story decided that the flats between high and low water mark were not conveyed by the deed.

And in the case of *Hatch v. Dwight* (17 Mass. R. 298) the Court decided that where land was bounded by the *bank* of a stream, it necessarily excluded the stream itself. In delivering the opinion of the Court in that case, Parker, C. J., says, that the owner may undoubtedly sell the land without the privilege of the stream "as he will do if he bounds his grant by the bank."

In *Jackson v. Hathaway*, 15 Johnson (N. Y.) 447, 452, where parcels of land were conveyed, one on the north side of a road and the other on the south side, it was held that the conveyances did not include the road. That case has been cited many times and followed where the question was whether the grant went to the center line or was limited to a specified boundary. It is a leading case on the subject.

The survey as shown by Lovejoy and Emslie's field notes was by courses and distances the lines ending at posts. Field notes of survey of Lot 78. Record p. 111. The notes describe the quality of the land.

In our case, Marsden Davey testified that the stakes were 12 to 15 feet horizontal from the margin of the stream, and the surveyors' map, agreeing with field notes, has two lines that were not co-incident, one being the line of the survey and the other the line of the top of the bank (pp. 102-3). The conveyances by that survey do not go to the water and convey no right in it.

Child v. Starr, 4 Hill (N. Y.), 374.

Starr v. Child, 5 Denio, 599.

(These are leading cases which have since been followed in *Matter of Brookfield*, 176 N. Y., 145 and other cases.)

The cases of *Child v. Starr* and *Starr v. Child* refer to Genesee River, the title to which came from the same source as that of Buffalo Creek. Both were purchased from Massachusetts and were in the tract decided to belong to it under the grant from the Crown of Great Britain, when the conflicting claims of New York and Massachusetts were settled.

XLIV.

It was proved that there was a market for the land under water irrespective of ownership of adjacent land and in the language of the learned judge "the possible connected use of the two would be (was) an element of much importance in passing upon the value of the land" (pp. 44, 45, 48, 51, 53-4).

Witnesses for both parties mentioned instances of sales of land under water by the State (although the State did not own the adjacent lands) and proof of another sale was offered, which should have been received (p. 53).

All the witnesses agreed that land under water when connected with adjacent lands enhanced the value of the uplands many times over. That gave the land under water market value and made a demand for it at substantial prices (p. 43).

Purchasers are found among those who can profitably use property not owned by them. It is not so much the *use that the seller* can make of the property as what the *buyer* can do with it that leads to the trade and is the important factor in making the price and market. (Testimony of W. H. Slade, pp. 44, 48.)

The learned Judge failed to consider that "the possible connected use" of the land under water with the uplands *existed* and was an element of market value which might be realized by sale from one of the owners to the other if the ownership was separate, or by a purchase of both by persons having use for both together (pp. 43-4).

In *Boom Co. v. Patterson*, 98 U. S., 403, 408, it is said: "its capability of being made thus available gives it a market value." It has been so held in many cases.

Matter of Gilroy, 85 Hun (N. Y.) 424.

Matter of Trustees, etc. of College Point v. Dennett, 2 Hun, 669.

Matter of N. Y. C. & H. R. R. Co., 6 Hun, 149.

Alloway v. Nashville, 88 Tenn., 512.

Young v. Harrison, 17 Ga., 30.

L. R. Jet. Ry. Co. v. Woodruff, 49 Ark., 381.

Goodwin v. Canal Co., 18 Ohio St., 149.

Dickenson v. Inhabitants, 13 Gray (Mass.), 546.

10 Am. & Eng. Ency. of Law, 2nd ed. 1161-2.

People ex rel. L. V. Ry. v. City of Buffalo, 36 N. Y. Suppl. 191, aff'd 147 N. Y. 675.

Wharves for the business of one of the greatest ports in the country are upon land that was under water.

Nearly all of the land under water adjacent to uplands in the City of Buffalo, suitable for dockage, has been sold (pp. 44, 82). It is more valuable than uplands without water connections, and there is a firmer and readier market for it (pp. 43-4). Its adaptability to an advantageous use is an element of damages.

Laffin v. C. W. & N. R. Co., 33 Fed. R., 420.

In our case the Appellate Division said: "The basis of the order appealed from is that the property of the owner was of no value as to him, and, therefore, that the other party could acquire the same without paying any compensation therefor. We think the determination is *abhorrent to justice* and to any rule of equity which has been enunciated in any well considered case" (p. 122).

116 App. Div. R., 557.

The questions were defective because they did not state the facts relating to ownership of adjacent land.

XLVII.

The Court of Appeals' opinion also states that the evidence of the witnesses "Presented a well defined question of fact, the testimony ranging all of the way from nominal figures to one of very substantial amount." (P. 128).

The nominal figures were merely opinions based on suppositions in respect to facts and legal rights as to which the witnesses were mistaken. Such opinions are not evidence. When the erroneous assumptions, or suppositions were corrected, the same witnesses agreed that the property had substantial value. Statement of City's evidence as to values in above "Statement of Facts."

Expert witnesses can only give their opinions upon the facts proved.

Greenleaf on Evidence, Sec. 440.

An expert witness should be confined to questions which contain in themselves the facts assumed to be proven and upon which his opinion is desired.

Link v. Sheldon, 136 N. Y. 1, 9.

Where the facts assumed for a basis for the opinion are disputed, the question should be hypothetical and it will be for the Court or jury to decide whether the assumed facts have been proved. If they have not, the opinion is entitled to no weight.

Dickenson v. Inhabitants, 13 Gray (79 Mass.) 556-7.

Boldt v. Murray, 2 State Rep. 232 (N. Y.)

Reynolds v. Robinson, 64 N. Y. 595-6.

The expert witnesses in this case were tested to ascertain the basis for their opinions. It was found that they assumed that the owner had *no adjacent land or title* that carried with it the right to use the land under water and based their opinions on such assumed facts that were proved to be otherwise, and upon assumptions that the owner had less legal rights in the property than well settled principles of law give him. (Banks v. Colgate, 67 N. Y. 512, 516). One said, "I don't grant that the owner has any rights"; another said, "I think the public have a right to land and water both"; another, "I mean that I think that the public own all the rights in a public highway," and a fourth said that if the same rights existed in this river as in some others he testified were valuable, then it would have a like value. (Statement of Facts, under head "City's Evidence of Value," *supra*.) The opinions that the property was not valuable were based upon supposed defects in the title and want of connection with adjacent land. The property itself, free from imperfections of title, they testified was valuable.

When their mistakes of law and fact were corrected and they were asked for opinions on the facts as actually proved, with the owner's legal rights correctly stated, the witnesses all agreed that the property was valuable.

See *supra*, under the heading "City's Evidence as to Values"; also, "Owner's Evidence as to Values" and "Owner's Evidence of Title" in the Statement of Facts.

When it was shown that the opinions were given on a false basis, they lost all weight as evidence, and the evidence of all the witnesses agreed that the property had more than nominal value.

T. & B. R. Co. v. N. T. Co., 16 Barb. 100 (N. Y.).
Authorities, *supra*.

The Court of Appeals, in reviewing the evidence and exercising its judgment upon it, stopped too soon, and did not consider all of the evidence and facts proved and failed to discover that the *opinions* which it supposed raised a substantial conflict of evidence were based on facts which were proved to be otherwise than those assumed, and upon errors in respect to the owner's legal rights. If the facts had been stated in the questions, they might not have fallen into so many errors respecting them.

The Appellate Division, having power to review the evidence, went further and found that it was conclusively proved that the property was valuable. (P. 122).

The Appellate Division was right in respect to the facts and was under obligation to grant a new appraisal as matter of law.

The Court of Appeals was wrong on the facts and erred in their decision.

It was the province of the Appellate Division to draw the conclusions from the evidence and certify them. The questions were insufficient in not certifying the fundamental facts.

XLVIII.

The opinion also states that "The commissioners were under obligation to and we must assume did, view the premises to be taken." (P. 128).

What they saw, if anything, is *not stated in the question* and it no where appears that they saw anything different from what the witnesses testified to. If they saw anything not stated in the case, it does not appear in the question and the Court of Appeals had no way of knowing what it was. Facts were proved which a view of the premises would not overcome.

The case states that it "contains all of the evidence." (Page 107). If any facts different from those the witnesses testified to had been obtained from a view of the premises, they would have been stated in the case. (In *re* Bense, 124 N. Y. Supp. 49) or might have been proved by

witnesses. That there were none appears from the statement in the case.

The Special Term and Appellate Division had to base their action on what was contained in the record, not what the commissioners might have seen and failed to record.

In *Jeffersonville M. & I. R. Co. v. Brown*, 40 Ind. 549, the Court said: "The bill of exceptions, therefore, stating that it *contains all of the evidence*, we must so regard it notwithstanding it appears that the jury were sent to and viewed the place where the facts occurred."

Views of commissioners are not evidence. Notwithstanding such view, their assessment must be supported by the testimony or it cannot stand.

Matter of City of N. Y., 66 Misc. R. 488 (N. Y.);
67 Id. 194-5.

Heady v. Vevay, etc., Co., 52 Ind. 117.

Close v. Samm, 27 Iowa 503.

Washburn v. Milwaukee, etc., 49 Misc. (N. Y.)
365.

Jefferson, etc., v. Brown, 40 Ind. 549.

Matter of Bensel, 124 N. Y. Supp. 49.

Laffin v. Chicago W. & N. R. Co., 33 Fed. R. 416,
424.

Their view of the premises is for the purpose of enabling them to better understand the testimony of witnesses.

Jeffersonville etc. v. Brown, 40 Ind. 540.

Matter of City of N. Y., 66 Misc. 488; 67 Id. 194-5.

Laffin v. Ch. W. & N. R. Co., 33 Fed. R. 424.

The knowledge which a jury acquires by a view of the premises may be used by them in determining the weight of conflicting testimony respecting value and damages, but no further. The final conclusion must rest upon the evidence adduced.

Laffin v. C. W. & N. R. Co., 33 Fed. R. 424.

"Where the conclusions of commissioners are not supported by any testimony, or any other fact shown by the record, their report should show how and by what process of reasoning their conclusions were obtained."

In re *Bensel*, 124 N. Y. Supp. 50-51.

Had their report given their reasons, it would have shown that they made the award under misapprehension and on erroneous principles.

The Court was not precluded from setting aside the report on account of the insufficiency of the award by the provision of law authorizing the commissioners to view the premises.

Notice of Appeal bringing up all proceedings,
Record, P. 1.

Code C. P. Secs. 3371; 3375; 1346; 1361; Sec. 3377.

Matter of Brooklyn, etc., 80 Hun. 355.

In re Bensel, 124 N. Y. Supp. 49.

Matter of City of N. Y. 66 Misc. R. 488 (N. Y.).

Matter of City of N. Y. 67 Misc. R. 194-5.

The law requires the commissioners to hear the proofs and allegations of the parties and reduce the testimony taken by them to writing and to make a report of their proceedings to the Supreme Court with the minutes of testimony taken by them. Their report is without force until confirmed by the Court, to whom the testimony is reported, and the Court has the testimony taken for consideration and review when application is made for confirmation and bases its decision upon that.

Commissioners of appraisal should be guided by established rules of evidence. Where parties may have been injuriously affected by receipt of proof which ought not to have been admitted by established rules of evidence, their report will be set aside.

T. & B. R. R. Co. v. N. T. Co., 16 Barb 100 (N. Y.).

Where commissioners awarded much less than the value of the property taken according to the testimony of every witness put upon the stand, it was held to be an arbitrary exercise of power not justified by the law.

N. Y. W. S. etc R. Co. v. Yates, 18 Weekly Dig.
272 (N. Y.).

Neither an award in excess of what the owner claims nor one less than that testified to by the City's witnesses should be allowed to stand.

Matter of City of N. Y., 66 Misc. 488.

Matter of City of N. Y., 67 Id. 194-5.

Since the commissioners are required to report their proceedings to the Court with the minutes of the testimony taken by them, they are required to consider the written evidence, and their awards are open to review. The commissioners, therefore, could not disregard the testimony of the witnesses.

66 Misc. 488.

67 Misc. 194-5, *supra*.

Matter of Met. etc. R. R., 76 Hun. 375.

Matter of Water Com., 96 N. Y. 351.

Matter of Opening Eleventh Ave., 81 N. Y. 437.

Matter of N. Y. W. S. & B. Ry., 94 N. Y. 287-292.

Matter of Utica Ec. R. R. Co., 56 Barb. (N. Y.) 456.

Matter of N. Y. C. & H. R. R. Co., 6 Hun 149.

Jeffersonville etc. v. Brown, 40 Ind. 549.

Heady v. Vevay etc., 52 Ind. 117.

Close v. Samm, 27 Iowa 503.

Washburn v. Milwaukee etc., 49 Misc. 365.

Also cases cited under previous points.

Matter of Brookfield, 176 N. Y. 145.

XLIX.

The opinion states: "The river has been made a public highway by law." (p. 126).

That is not stated as a fact in the questions.

There is no question of law certified or based on such an assumption. The Code prohibits the review or determination of any question except those certified.

The Court was mistaken in respect to the fact. The State of New York never *owned* the property and could not make it a highway by legislative enactment without compensation and there was no compensation or process of law provided for.

(See Statement of Facts, *supra*, & Assignment of Errors No. 6, p. 143).

The Charter provision, declaring Buffalo R. within the City, "a public highway" was unconstitutional (so far as the river above Hamburg St. is concerned) because New York did not *own* the land. The only claim that New York had under the grant in 1664 by Charles II to the Duke of York was to parts of Eastern New York and parts of New England. *That grant did not cover any portion of Western New York.* The grant to Mass. Bay in 1628 included "*rivers*" (P. 117, 44) and having been made prior to 1775, was confirmed by the N. Y. Constitution of 1777, Sec. 36.

(See also Const 1894, Art. 1, Sec. 17). The legislature could not impair that grant.

When the grant to Mass. Bay Colony was made in 1628, no streams, except those in which the tide ebbed and flowed, were considered "Navigable."

A statute which involuntarily transfers property, or takes away valuable attributes of property, without due process of law, and without compensation, is unconstitutional, whatever may be the pretext upon which it is founded.

Gilman v. Tucker, 128 N. Y. 190.

DeCamp v. Dix, 159 N. Y. 436.

Forster v. Scott, 136 N. Y. 577.

Trustees v. A. & R. R. Co., 3 Hill 567. (N. Y.).

Williams v. Mayor, etc., 105 N. Y. 437.

Brewster v. Rogers Co., 42 N. Y. App. Div., 343.

Heyward v. Mayor of N. Y., 7 N. Y. 324.

Heard v. City of Brooklyn, 60 N. Y. 242.

In *Cromwell v. McLean*, 123 N. Y. 474, 491, Mr. Judge Peckham said: "I have not been able to find a case which points to the existence of a power on the part of the Legislature to convey the title of a man's property from him to another by a mere exercise of the legislative will."

In *Forster v. Scott* (136 N. Y., 577), a statute (said to have been "of somewhat ancient origin") declaring that "no compensation shall be allowed to the owner of land taken for a street for any building erected or placed thereon after the *filing of a map of the street*" was adjudged to be *unconstitutional because it imposed* "a restriction upon the use of the land, which amounts to an *incumbrance*."

In *Heywood v. Mayor of N. Y.* (7 N. Y. 324) the Court said: "It is settled by cases too numerous to need citation that no power exists in the Legislature or elsewhere to take private property without the consent of the owner for public uses, with or without compensation, except by due process of law; by which is meant the judgment of the law pronounced upon trial after the matter is judicially ascertained."

In *Gilman v. Tucker* (128 N. Y., 190) it was held: "A statute which assumes to *destroy* or nullify a party's

inuniments of title is as effective in depriving him of his property as one which bestows it directly upon another. So, also, *authority which permits a party to be deprived of his property by indirection is as much within the meaning and spirit of the Constitutional prohibition as when it attempts to do the same thing directly.*"

In 1832 when Big and Little Buffalo Creeks "*within the City*" were by the City Charter of that year declared to be "*public highways*" the City limits extended no further than the Indian Reservation Line near Hamburg street. (ch. 179, Laws 1832) Applying the rule of construction "*expressio unius est exclusio alterius*," (Morton v. Horton, N. Y., 398, 400) the portion of Big Buffalo Creek (now River) not "*within the City*" was not a public highway. When the City limits were extended in 1853 (ch. 230, Laws 1853) the same provision remained in the charter, but at no time was there any "*process of law*" or compensation to the owner of the stream. In the charter of 1870 or 1891 (ch. 519, Laws 1870 & ch. 105, Laws 1891) Little Buffalo Creek was omitted for the reason that it had been diverted and filled in and built upon. (P. 88, 83). See also City of Buffalo v. Hoffeld, 6 N. Y. Misc., 197.

Little Buffalo Creek was a branch of Buffalo River, leaving the latter above Seneca street and rejoining it near its mouth. Little Buffalo Creek was as large as Buffalo River (p. 88).

The provisions of the City Charter (Sec. 404) just referred to provides: "*Buffalo River, within the City, is a public highway, but any bridge heretofore built and now existing over the same * * is a lawful structure.*"

The N. Y. Constitution, Art. 3, Sec. 16, provides: "*No private or local bill, which may be passed by the Legislature, shall embrace more than one subject, and that shall be expressed in the title.*"

Chap. 105, Laws 1891, of which Sec. 404 is a part, was entitled "*an act to revise the Charter of the City of Buffalo.*" The Charter was a local act and Sec. 404 was unconstitutional. There was no reference in the *title* of the act, nor in that of the original charter to Buffalo River.

People v. O'Brien, 38 N. Y. 193.

People v. Hills, 35 N. Y. 449.

Matter of Prospect Park, 60 N. Y. 398.

New York Constitution, Art. 3, Sec. 18, provides: "*The*"

Legislature shall not pass a private or *local* bill in any of the cases: * * Laying out, opening, altering, working or discontinuing roads, *highways* or alleys, or for draining swamps or other low lands * *."

"The Legislature shall pass *general laws* providing for the cases enumerated in this ~~section~~ * *."

If the above provision does not apply to "water highways" then the City has no power to take our lands "for the purposes of a public highway" (p. 4), because the Charter does not give power to take for a "highway" or for "a water highway."

In *Brewster v. Rogers Co.*, *supra*. (42 N. Y. App. Div., 343) the Court said that the act must provide for compensation to the owners of the bed of the stream for the right of passage over their property, and that Ch. 533, Laws of 1880 and Ch. 363, Laws of 1893, are unconstitutional because they do not provide for compensation to owners of the bed of the stream.

Most of the evidence relating to uses of the river referred to in the opinion applied to the river *below* the Indian Reservation Line, which had been excavated and docked. Testimony of Engineer Norton, pages 82-3. The title to that part was different and the Court overlooked the evidence in respect to the title at pages 117-118 of the Record and the statements in the case on pages 37 and 45 and failed to remember that this was not a proceeding to try the title.

There are miles of artificial channels in Buffalo constructed through dry land by private capital, navigated by the largest vessels on the lakes, but the property is private.

L.

No part of Buffalo Creek was in its natural state a navigable stream.

People ex rel. Lehigh V. Ry. Co. v. City of Buffalo, 36 N. Y. Supp., 191; aff'd. 147 N. Y. 676, 682.

D. & H. Canal Co. v. City of Buffalo, 39 N. Y. App. Div., 333; aff'd. 167 N. Y. 589.

City of Buffalo v. D. L. & W. R. R. Co., 126 App. Div., 128.

Wadsworth v. Buffalo Hyd. Ass'n., 15 Barb. (N. Y.) 83, 87.

Histories in Buffalo Public Library, viz.:

History of Buffalo by H. Perry Smith, 116, 683.

Ketchum's History of Buffalo, Vol. 2, 247.

Turner's History of the Holland Purchase, 641.

"Judicial notice may be taken of facts which are a part of the general knowledge of the Country, and which are generally known and have been duly authenticated in repositories of facts open to all."

Hunter v. N. Y. C. & H. R. R. Co., 116 N. Y., 621.

It has been decided a number of times that the stream above Hamburg street was not navigable.

That Buffalo Creek was not naturally a navigable stream appears from facts stated in books of history in public libraries, written by authors since deceased, and statements of facts in opinions published in the official reports of cases decided by Courts of the State, to which the City was a party and in which its officers were witnesses. (See above cases).

It also appears from testimony of witnesses in this case, referred to at the end of this point.

Turner's History of the Holland Purchase, published in 1850, at page 64, says: "Previous to 1820 no lake craft larger than a canoe or French bateau had entered the mouth of Buffalo Creek. The stunted commerce of the lakes had no harbor at the foot of Lake Erie, except Black Rock; vessels discharging freight destined for Buffalo, or taking freight from there, either did it at Black Rock, or laying off the mouth of Buffalo Creek, received and discharged freight by means of small boats."

In Ketchum's History of Buffalo, Vol. 2, p. 247, it is said in respect to Buffalo in 1811: "As yet, nothing had been done towards opening the mouth of Buffalo Creek so as to admit vessels of any size. Nothing had been erected to check the drift of the sand along the shore towards the Niagara River, and at almost all seasons of the year, there was a continuous broad beach of sand along the lake shore—scarcely broken by the discharge of the waters of Buffalo Creek into the lake. At the dry season of the year, it was a *mere rivulet* which required little exertion to step across, and all vessels navigating the lake were necessitated to go into the Niagara R. for shelter

or to discharge a cargo on the American side."

On the 16th of March, 1811, pursuant to an Act of Congress, the President designated Black Rock, on the Niagara R., as the Port of Entry for the District of Buffalo Creek, (Id.) because all the commerce of the District went to Black Rock on Niagara River.

"In 1818, on the application of the citizens of Buffalo, the Legislature of the State authorized the survey of the mouth of Buffalo Creek, with a view to the construction of a harbor. This survey * * was made gratuitously by the Hon. Wm. Peacock. The next year the Legislature authorized a *loan* of twelve thousand dollars for the construction of the work. This loan was secured by the bond and mortgage of Charles Townsend, Oliver Forward, Samuel Wilkinson and George Coit. The money was expended under the superintendence of Judge Samuel Wilkinson." Id., p. 253-4.

The state simply lent money to individuals on good security and spent none itself.

In the History of the City of Buffalo by H. Perry Smith, on page 115, it is said: "As to Buffalo Creek, all agreed that it was worthless as a harbor on account of the bar at its mouth. All sail vessels stopped at Black Rock and only a few open boats came into the Creek."

And on p. 683, the writer states that he can remember being perched on his father's shoulders as he waded across the mouth of Buffalo Creek.

He also narrates the beginning of work to make a harbor in Buffalo; how several men signed a bond to obtain money to begin the work and how and by whom the first work was done. From that small beginning what was a worthless creek for navigation purposes has been dredged and improved by artificial means until it has become from its mouth to Hamburg street of much commercial importance, as stated in the opinion, and is now dignified by the title of "River," but it was not naturally so. A large amount of private capital has been expended in making it navigable so far as its navigability extends, but none has been expended by the State.

In the case of the People ex rel. Lehigh V. Ry. Co., v. City of Buffalo, reported in 36 N. Y. Supplement, 191, the Court said: "The river bounding the whole lands upon the northwest is *unnavigable*;" also, "between these

points and 3200 feet east from the relator's land the Buffalo River is *unnavigable* as appears from the testimony of the engineer called by the City * *." (The "points" last mentioned are on a part of the river taken in this proceeding, a little above the line of the Indian Reservation near Hamburg street, as appears from the facts stated in that opinion.)

The Court of Appeals, in affirming the Lehigh case above cited (147 N. Y., 682) said: "The rock in the bed of the river, below the relator's land, *prevented its navigation*. Above the improvement along the relator's water front on the river there was little if any rock, and at a comparatively small expense the channel *can be made navigable* by dredging."

D. & H. Co. v. City of Buffalo (39 App. Div., 333) relates to the tax assessed for removing the rock to make the river navigable and states that the channel was excavated to a width of 170 feet.

In City of Buffalo v. D. L. & W. R. R. Co. (126 App. Div. Rep., 128 N. Y.), it is said: "* * The plan, and the only plan, proposed by which the river *is to be made navigable in fact* involves a *change in its channel* to a distance of 500 feet north-easterly. * * It is demonstrated by the evidence in the case that as a matter of fact such river is *not now a navigable highway* of commerce at the point where it is proposed by the defendant to reconstruct the bridge in question. *It may become navigable in fact* if the channel is changed and greatly deepened and numerous other obstructions removed" etc. That relates to a bridge near Abbott Road, above Hamburg street and upon the property affected by this proceeding.

It also appears that the Secretary of War declined to intervene. Id. 129.

The United States has not asserted jurisdiction over the Buffalo R. or expended any money on it and the City of Buffalo had not acquired any right to the part sought to be taken in this proceeding. It prosecutes this proceeding because it did not have the title.

The case of Wadsworth v. Buffalo Hyd. Ass'n. (15 Barb. (N. Y.) 83, 87) decided in 1853, related to a grant made in 1828 by the Indians and the trustees of the Ogden Land Company to the Hydraulic Ass'n. of the right to construct a dam in the *bed* of Buffalo Creek and to take water from

the creek by a canal upon the Indian lands for Hydraulic purposes and to supply Buffalo with water. Id. 87. No doubt was expressed as to their ownership of the bed of the creek or their right to make such a grant.

It appears that the Association availed themselves of the rights granted.

The Chief Engineer of the Board of Public Works, who was a witness for the City, testified in this proceeding in respect to the River: "In some places it is quite narrow and in some places there is considerable width and bars where the water flows over in very small quantities; in some places the water is deep and in others it is shallow." (P. 38).

The Assistant City Engineer, another of the City's witnesses, testified: "I should think you could get a channel in the upper end of the stream about 2 feet deep and 25 or 30 feet wide, but that would be a fair average channel in the summer season; you couldn't get it all the time." (P. 84.)

It was a fresh water, non-tidal, non-boundary stream, and the part taken in this proceeding was within the boundaries of a reservation set apart for and occupied by the Seneca Nation of Indians at the time when the pre-emption right to the reservation was conveyed to the Ogden Land Co., under a title obtained by purchase from the State of Massachusetts, which derived its title through a grant from the Crown of Great Britain, and it was not a highway of commerce. *It was non-navigable in law.* 200 N. Y. 400

Its mouth in the dry season was a mere rivulet that could be stepped across. Ketchum's History of Buffalo, Vol. 2, p. 247.

Previous to 1820 no lake craft larger than a canoe or French bateau had entered the mouth of Buffalo Creek. Turner's History of the Holland Purchase. Page 64.

The following is substantially all there was to the City's claim to "navigability in fact."

T. V. Fowler, connected with the Buffalo Chemical Works on the river for 27 years testified (P. 54-5): " * * We have not brought any (boats) up for about 5 years. * * After the Lackawanna built the bridge across the River, there was a bar right in the center and a bar formed right across the River and for two seasons we dredged them out and that did not pay. It was cheaper for us to bring our

freight by rail and we discontinued using the River. * * *The only one that used the River to any extent besides ourselves was the Genesee Oil Co. when they were there. Their works are not there any more. Our works, as shown on this map, are located at the corner of Lee & Prenatt street on lot 194. The Genesee Oil Works were located near Babcock street shown on the map. * * It was more than 5, it must have been 7 or 8 years ago that they were there. * * The River has worked a new channel for itself through that part of the territory. I don't know of the use of the River for any other craft or for anything of that kind. * * None of the boats used the River above our place."*

B. T. Couch, a witness for the City, testified (P. 56): *"I know that steam yachts have come up as far as Seneca street. * * I should think there were three there at one time; I know there were. I couldn't just tell you the length of any of the yachts. * * I think they were mostly used for pleasure purposes. * * I should say the boats were there three or four years; * * not all of them. I couldn't tell just how long any of them was on the River."*

City's Chief Engineer testified: *"I have been familiar with the Creek as long as 14 or 15 years anyway. To my knowledge boats go up the Creek to the Chemical Works"* (The ones testified to by Mr. Fowler as having stopped some 5 or 6 years before). *"I never saw boats go beyond there."*

William H. Newerf, a witness for the City, testified (P. 57): *"What in the early days, if you know, was the use made of Buffalo R., or Buffalo Creek, along the waters of it? Objected to as immaterial; objection overruled; exception. * * (P. 58) Logging ceased very many years ago; 30 or 35 years ago or over. (P. 60) No large vessels came above the Union Iron Works. They dredged the River out there sufficiently to admit large craft coming up to the Union Iron Works; it is near the foot of Hamburg street. (P. 62) I have seen flat boats go up to the Chemical Works. * * Years ago there were more of them than in the past 8 or 10 years, because the water was much deeper. * * The stream has been gradually filling up the last 10 years with sand and gravel, which has been brought down from the country. What I mean by navigable, is not only these canal boats but small boats*

that could run on the stream. *I think it must be about 30 or 35 years ago that they stopped rafting and bringing down wood there.* * * At the present time at Seneca and Elk street there is a bar there now at low water. * * That is the only point where you could not row a small boat."

The case of Wadsworth v. Buffalo Hydraulic Association, 15 Barb. (N. Y.) 83, shows that the Ogden Land Co. were careful to control the use of the river for logging &c. In that case they provided in an agreement, as follows: Subject to a condition that the floating or transporting of any rafts, lumber &c. over said canal, (Little Buffalo Creek) should be at all times prohibited and effectually prevented, otherwise than as might be permitted and allowed by the express consent in writing of the parties of the first part." (Ogden Land Co.).

William Hammersmith, a witness for the City, testified (P. 67): "That logging business continued until there was no more lumber. I couldn't tell you exactly how long ago that was, about 20 years. *There were certain years, I forget now when, there used to be two or three boats out there every night, pleasure boats.* * * I have not seen those pleasure boats, those little steam launches, go up there since 12 years ago. * * The other kind of boats that stopped going up there some 12 years ago were bigger boats, steam yachts. (P. 69) The last time I saw Mr. William Hard bringing logs down to his saw mill was between 30 and 40 years ago. There hasn't been any lumber there since. *Old Heacock used to fetch logs down on the Buffalo R. He has been dead 30 or 40 years. The logging stopped at that time. The trees had all been cut off up there.*"

Assistant City Engineer Norton testified (P. 79): "I know the depth of the River there because *I have measured it all the way.* In some places it is quite shallow; in some places it is deep. From Hamburg street down there was rock bottom. It has been dredged out there. * * The large boats carrying ore go to the dock of the furnace (Union Iron Works). *I think that is about the limit for lake craft, excepting harbor tugs.*"

He did not tell the depth although says he had measured it. Even if this part of the river had been a highway for logging in N. Y. State a highway or a part of a highway not used or traveled for 6 years ceases to be a highway.

Hovey v. Village of Haverstraw, 124 N. Y., 273.

City of Buffalo v. Hoffeld, 6 Misc. (N. Y.) 197.

Under the City's testimony very little of this part of the river had been used for any purpose (except from Seneca street down, by 3 or 4 small pleasure yachts) for more than 6 years.

LI.

The Appellate Division was authorized to direct a new appraisal "in its discretion."

Sec. 3377 is as follows: "On the hearing of the appeal from the final order the Court may direct a new appraisal before the same or new commissioners, in its *discretion*
* * *"

That provision applies to appeals in condemnation proceedings prosecuted by the City of Buffalo.

Matter of City of Buffalo, 17 N. Y. State Rep., 371.

The Charter of the City of Buffalo does not regulate appeals from orders of confirmation in condemnation proceedings. Those have always depended upon the Code provisions.

LII.

The opinion states: "**The 4th question** must be answered in the negative. There are no exceptions presented for our consideration which bring up any such substantial errors as require a reversal of the order at Special Term." That was the fault of the *question* which fails to specify them.

Point XXX *Supra*.

The exceptions mentioned in the above statement of facts and the assignment of errors pointed out substantial errors appearing in the record, as did the defendant's points and oral argument, which required a reversal of the order of the Special Term. The constitutional question was the one towards which almost everything in the case was directed. *The defendant claimed the right to compensation under the provisions of the Federal Constitution. The admission of any evidence tending to support a denial of that right was harmful and erroneous.*

The order of the Special Term recites that it was opposed upon the written exceptions to the report duly filed and served. P. 36.

The mere negative answer to that question does not certify to the Appellate Division any definite question of law determined by the Court of Appeals, and the opinion does not point out why the exceptions did not bring up such substantial errors as to require a reversal of the order of the Special Term. It does not even state that all of the exceptions were considered, or point out any one of the exceptions which it deemed insufficient.

It did not follow, as the Court said, that the order of the Appellate Division should be reversed if there were no exceptions requiring a reversal.

Snebey v. Conner, 78 N. Y. 219. Cited in 164 N. Y. 476, and in many other cases.

The order was not shown to be erroneous by showing that there was no valid exception in the case, provided it was in such a condition that the Appellate Division could have reversed on the facts.

Harris v. Burdett, 73 N. Y. 138.

The Appellate Division had power to reverse the order on the facts, and to grant a new appraisal in its discretion. The first two questions ask if Charles E. Appleby, etc. *under the facts* in this proceeding was *entitled* to an award of more than six cents, etc. If he was, the order of the Appellate Division was right. Without the facts (or authority to decide what they were), the Court of Appeals did not have any basis for reversal of the order and should have dismissed the appeal.

Matter of Westerfield, 163 N. Y. 210.

The opinion of the Appellate Division and the first two questions "under the facts in this proceeding" show that the Appellate Division based its reversal on *facts* it decided were established by the evidence, and its decision was not reviewable by the Court of Appeals. There is no statement to the contrary in the order, opinion or questions. The questions "under the facts in this proceeding" should be construed as meaning the facts the Appellate Division found or might have found from the evidence in favor of the party in whose favor its decision was rendered and they were ample to sustain its order of reversal.

Mickee v. W. M. & R. M. Co., 144 N. Y. 614.

Caponigri v. Altieri, 164 N. Y. 476.

LIII.

The 3rd question.

"Does the City of Buffalo in this proceeding show a *necessity* for acquiring the fee of the land?" was not answered.

It must have been answered in the negative, if answered correctly.

Whether the use for which property is taken is necessary and a public use is a judicial question. In taking land under water in a crooked stream, varying greatly in width, it does not appear that the *whole* width is required for a public use. In places the stream was 270 feet wide, in others only 70. Below only 170 feet was left between the docks (39 App. Div., 333).

The Condemnation Law (Code C. P. Sec. 3360, subd. 3) required the applicant for condemnation to show "The public use for which the property is required and a concise statement of the *facts* showing the *necessity* of its acquisition for such use." The owner was entitled to *the equal protection of the laws*, which means the protection of equal laws.

Yick Wo v. Hopkins, 118 U. S., 356, 367.

Drew v. Cass, 129 App. Div., R. (N. Y.), 457.

The Condemnation Law by its terms applies to proceedings instituted by "the State or a political division thereof" Sec. 3358.

He was entitled to the protection of that provision of law in common with the other inhabitants of the State.

The question was jurisdictional and if answered in the negative involved a dismissal of the proceeding.

The Code of Civil Procedure by Sec. 3359 provides that "Whenever any person is authorized to acquire title to real property, for a public use by condemnation, the proceeding for that purpose shall be taken in the manner prescribed in this title." The City Charter may be referred to for authority to take, but it is not complete in itself in respect to the procedure and is subject to the provisions of the Condemnation Law. That appears from provisions in the Charter itself, as well as by the positive provision above cited.

The Charter omits provisions for judicial proceedings, (due process) such as *petition, answer, issues and trial*. Instead, it provides that "when the mode or manner of conducting all or any part of the proceedings for the appraisal and proceedings consequent thereon are not expressly provided for by this act, the Court before which such proceedings may be pending shall have the power to make all necessary orders and give all the proper directions to carry into effect the object and intent of this act. The *practice* in such cases shall conform, as near as may be, to the ordinary practice in such Court."

Sec. 423, Title 20, Chap. 105, Laws 1891.

The Condemnation Law, Secs. 3357 to 3384, Code of Civil Procedure, prescribes "the ordinary practice in such Court."

By Chapter 589, Laws 1896, amending Sec. 3358 of the Code, the word "person" when used in the Condemnation Law, was defined so as to include "the State and a political division thereof," so that the word "person" in Sec. 3359, *supra*, includes "a political division of the state," which the City of Buffalo is, and the Condemnation Law applies to it.

The notice of intention and of determination to take are "preliminary steps" necessary to be complied with before there is any authority to institute proceedings but do not supply the place of the petition required by Sec. 3360 of the Code or other requisites of judicial proceedings for condemnation.

"The Condemnation Law" provides for what is recognized as "due process" in eminent domain proceedings brought by a city.

City of Geneva v. Henson, 195 N. Y. 447, 453-4.

Sec. 3360 C. C. P. provides: "*The proceeding shall be instituted by the presentation of a petition * * * setting forth the following facts:*"

"(1) Names, etc.

"(2) A specific *description* of the property to be condemned and its location *by metes and bounds*, with reasonable certainty."

"(3) The public use for which the property is required and a concise statement of the *facts* showing the necessity of its acquisition for such use."

"(4) The names of the *owners*, etc.

"(5) That the plaintiff has been unable to *agree* with the owner of the property for its purchase and the reason for such inability."

"(6) The *value* of the property to be condemned."

"(7) A statement that it is *the intention of the plaintiff, in good faith, to complete the work or improvement* * * * and that all the *preliminary steps* required by law have been made to entitle him to institute the proceeding." (In this case, the "preliminary steps" were the notices of intention and determination and the due service thereof, called for by the City Charter. There was no statement in said notices or elsewhere as to the *power* under which the City was proceeding.)

"(8) A demand for relief, that it may be *adjudged* that the *public use required* the condemnation of the real property *described*, and that the plaintiff is entitled to take and *hold* such property for the public use *specified*, upon making compensation therefor and that commissioners be appointed to ascertain the compensation to be made to the owners for the property so taken."

The City of Buffalo procured an act to be passed (Chap. 199, Laws 1901) permitting it to exchange lands "about to be acquired," which shows that all of the lands to be taken were not "necessary" for public use and were not to be used for "the purpose of a public highway." City's witness Griffin testified (p. 71): "I know of the act permitting the *exchange* of lands." The Act was read in evidence (p. 106). The case of City of Buffalo v. D. L. & W. R. R. Co., 126 App. Div., 128, shows that at one point the channel was to be moved 500 feet. The City's idea was to take the old channel and exchange it for other lands needed for the new, conclusive evidence that the land was worth more than 6 cents. The taking of lands "to exchange" for other lands is not a public use, and it did not show "The *intention of the plaintiff, in good faith, to complete the work or improvement*" (C. C. P. 3360), nor that the lands which the City intended to *exchange* were *necessary* for such use.

Due process of law must be general in its application. "*Equal protection of the laws*" is the Constitutional right. Unless the City Charter is construed with the Condemnation Law, it is not due process, because unless so construed the owner has not the protection of a petition alleging the facts required by the provisions of the Code above referred to, as other persons have when their property is being condemned.

There having been no petition or affidavit alleging the essential facts, the entire proceeding is without jurisdiction. Due process of law was lacking. The objection was duly taken. P. 34.

Condemnation Law (N. Y. Code Civ. Pro.) Secs. 3360, 3358 and 9.

Matter Marsh, 71 N. Y. 315.

City of Syracuse v. Stacey, 86 Hun (N. Y.), 441.

Matter R. E. R. Co., 123 N. Y. 351, 362.

City Geneva v. Henson, 195 N. Y. 447, 454.

In eminent domain proceedings under an act for improving the *navigation of rivers*, it was held in

Clay v. Pennoyer Ck. Imp. Co., 34 Mich. 204.

Fox v. Holcomb, 34 Mich. 298.

"The *petition* in such proceeding is *jurisdictional* and must set forth all the facts necessary to show that the petitioning corporation is *authorized* to make the proposed improvements, and has taken all the necessary preliminary steps."

The owner has the right to have the necessary facts so alleged that he may disprove them if he can. The owner may test the jurisdiction of the Court *after* the report of commissioners.

Fox v. Holcomb, 34 Mich. 204, 206.

In Doughty v. Hope, (3 Denio, 595; s. c. 1 N. Y. 79) it is held:

"Where property is taken under a statutory authority, without the consent of the owner, the power must be strictly followed; and if *any material link* is wanting, the whole proceeding will be void."

Lawton v. City N. R., 114 N. Y. Ap. Div. 884-5.

The petition is a condition precedent to the *power* to take.

Falconer v. B. & J. R. R. Co., 69 N. Y. 491.

Matter City of Buffalo, 78 N. Y. 362.

"In the Matter of the application of the City of Buffalo to acquire certain lands, etc., to abate the floods in and prevent the overflow of the waters of Buffalo R. and Cazenovia Creek" (Not reported; decided Aug. 4, 1904), Referee Dean held that the Court had *no jurisdiction* because the description was defective, and the proceeding was not instituted by a petition containing the necessary allegations; and that the Condemnation Law provisions must be complied with. He also held that the City Charter and Condemnation Law must be construed together. Among other cases, Referee Dean cited:

Erie & C. N. Y. R. R. v. Welch, 1 N. Y. App. Div., 140.

The Rochester R. Co. v. Robinson, 133 N. Y. 242.
Met. El. Ry. Co. v. Dominick, 55 Hun (N. Y.) 198,
200.

Matter of Citizens W. Wk's Co., 32 App. Div., 54.
City of Syracuse v. Stacey, 86 Hun (N. Y.), 441.
Matter N. Y. C. R. R., 70 N. Y. 191, 194.

"Where the rights of property are sought to be interfered with under the right or color of eminent domain, the *facts* necessary to give the Court, or officer, *jurisdiction* must appear in the petition."

Matter of Marsh, 71 N. Y. 315.

City of Geneva v. Henson, 195 N. Y. 447, 454.

The Marsh case was decided many years before the Condemnation Law was enacted and shows that the latter was only a codification of existing due process of law. The Charter provides: "The *practice* in such cases shall conform, as near as may be, to the *ordinary practice* in such court" (Sec. 423).

The order appointing the Commissioners speaks of "the petitioner" (p. 10).

If we are wrong in the contention that the failure to allege the *facts* mentioned in C. C. Pro. 3360 rendered the proceedings ineffective by what right did the City later attempt to prove facts not disclosed in their papers? The "estoppel" would seem to work against the City rather than against the owner who objected to the proof as soon

as offered. The City had no allegations on which to try any questions, and the evidence offered was incompetent.

It was the failure to have the *facts* provided for in the Condemnation Law legally *settled* before the commissioners were appointed that caused and permitted all the errors on the part of the commissioners, the Special Term and the Court of Appeals. Without allegations admitted, or findings of fact duly made (Based on issues decided by the Court, not by the commissioners) what right had the Court of Appeals to apply C. C. P. 1338 and determine what the *facts* of the case were?

“Secundum allegata et probata.”

Jurisdictional facts are defined in 24 “Cyc.” 375 as “Facts, the existence of which is necessary to the validity of the proceeding, *and without which the act of the Court is a mere nullity.*”

The necessity and extent of land is a judicial question.

Citizens Bk. v. Town of G., 173 N. Y. 215, 229.

R. & S. R. R. v. Davis, 43 N. Y. 137.

Matter Delavan Ave., 167 N. Y. 256.

“Since the power to condemn private property against the will of the owner is a stringent and extraordinary one, based upon public necessity, or an urgent public policy, the rule requiring the power to be strictly construed, and the prescribed mode for its exercise strictly followed, is a just one and should within all reasonable limits, be inflexibly adhered to and applied.”

Matter Water Com'rs, 96 N. Y. 351, 360.

Schneider v. City of Rochester, 160 N. Y. 165, 172.

Bell Tel. Co. v. Parker, 187 N. Y. 299, 303.

Matter N. Y. C., 70 N. Y. 191.

Matter R. E. R. Ry., 123 N. Y. 351, 360.

Sharp v. Johnson, 4 Hill, 92.

See 4th Spec. of Error, p. 142.

The burden of proving power and compliance with statute is on the City.

Sharp v. Speir, 4 Hill (N. Y.), 76.

In Matter Water Com'rs (96 N. Y., 351, 360) it was said: "It has been uniformly held that in proceedings of this character, *extreme accuracy* is essential for the protection of the rights of all parties (Matter N. Y. C. R. R., 70 N. Y., 191). There must be no uncertainty in the *description* of the property to be taken, nor in the *degree of interest* to be taken."

M. E. R. R. v. Dominick, 55 Hun (N. Y.), 198.

Lawton v. City of New R., 114 N. Y., App. Div., 883.

Matter DeCamp, 19 N. Y., App. Div., 564.

LIV.

The first two questions are irrelevant and incompetent because they include a question of title which could not be tried in this proceeding.

In re City of Yonkers, 117 N. Y. 572.

Point XVI, *supra*.

The ownership of the property or of the award is not determined by the proceeding, and the amount of the award should not depend upon any question of ownership. The amount should be compensation for the *property* and is not limited to a particular interest. The award should not have been nominal even if Mr. Appleby failed to prove title.

Matter of Dept. of Pub. Parks, 53 Hun (N. Y.), 298.

Point XVI.

The proceeding is one of appraisal and not to try title. The property is taken in fee simple, which includes title, the right of possession and the right to use for any purposes which may be lawful.

Matter of Brookfield, 176 N. Y. 145.

"The fee simple is the largest estate and most extensive interest that can be enjoyed in land, being the entire property therein."

1 Burrill's Law Dictionary under head "Fee Simple."

That was what the commissioners were appointed to appraise (p. 10).

The City took antagonistic positions. It instituted and prosecuted the proceeding to take the property in fee simple, but claimed that it should not pay for such a title. The appraisers found difficulty in fixing the value of an undefined interest and awarded a nominal sum instead of the value of the property in fee simple.

The City's counsel confused the commissioners by stating that the only person whose interest is sought to be taken is the interest of Charles E. Appleby, as trustee, thus by inference carrying the impression that his interest was limited, and by introducing evidence, which it was claimed showed that his title was defective or subject to encumbrances, thus presenting a question which could not be litigated in this proceeding, but was used to persuade the commissioners that they should not award the value of the property, and he continued the error by persuading the Appellate Division to certify a question asking if *Mr. Appleby was entitled* to an award of more than six cents instead of asking if the *owner and persons* interested were entitled, so as to cover what in fact the commissioners were to appraise. It confused the witnesses and the Court and led to injustice. That was sufficient ground for granting a new appraisal. The counsel did not attempt to define Mr. Appleby's interest. It had to be defined to be appraised.

Bell Telephone Co. v. Parker, 187 N. Y., 305.

The maps introduced by the counsel for the City, showing lots abutting on the river, were unauthenticated and incompetent and were proved to be incorrect by the field notes and the original map of Lovejoy and Emslie's survey and by the testimony of surveyor, Marsden Davey, who had surveyed lots according to the field notes.

The City's counsel based his argument in the Courts below upon the incompetent evidence and probably will here. The title was not on trial, and by proceeding to take the property in fee simple, the City admits the ownership and is precluded from disputing it. Were there doubt about the title, all rights there are in the land would attach to the award and they may be enforced against the fund or the person receiving it before a tribunal competent to try the title. The ownership of the award is not

determined by the commissioners. If they make the award to the wrong person, the right one may claim it.

Utter v. Richmond, 112 N. Y. 610.

Mitchell v. Vil. of White Plains, 62 Hun (N. Y.), 231.

Matter of Dept. of Pub. Parks, 53 Hun, 298.

Seton v. City of N. Y., 130 App. Div., 155.

City of Geneva v. Henson, 195 N. Y. 447, 455.

It was proved, however, that Mr. Appleby, as trustee, etc. was the owner (Pages 37, 45, 117, 118) and the descriptions in the deeds from him were such as to exclude the river and leave him a considerable amount of adjacent land, which had been added to by accretion, but his proof did not save him from the injurious effects of the incompetent evidence and the statements of the City's counsel. The commissioners adopted the theories of the counsel for the City and received the incompetent as competent and entitled to weight as such and allowed it to outweigh the competent evidence, and based their award on the supposition that the title was defective.

The questions were irrelevant as not covering the whole title and all interests for which the award should have been made without involving an inquiry as to the title.

Mr. Justice Harlan said (166 U. S., 236): "*The mere form of the proceeding instituted against the owner, even if he be admitted to defend, cannot convert the process used into due process of law, if the necessary result be to deprive him of his property without compensation.*"

LV.

The judgment rendered was not due process but only mere "form of law," without jurisdiction and contrary to the 14th Amendment of the Constitution of the United States.

It has frequently been decided in this Court that the *whole* case cannot be sent up in the form of questions and where it has been attempted the certificates have been dismissed.

United States v. U. P. R. Co., 168 U. S., 512.

Graver v. Faurot, 162 U. S., 435.

The order of the Appellate Division was not appealable (Matter of Gibson, 195 N. Y. 466) and the whole case could not be sent up by certifying questions.

Code Sec. 190.

It is still more objectionable to render *final* judgment on the whole case upon questions which cover only a part of it, omitting other questions upon which the judgment of the Court below might stand if brought up for review.

The questions did not state the grounds upon which the Appellate Division based its decision and did not call for a determination of anything other than its questions.

LVI.

This case was not within the spirit or intent of subd. 2 of Sec. 190 of the Code of Civil Procedure.

Under the facts in this case, a certificate that questions of law had arisen which ought to be reviewed by the Court of Appeals was not justified.

There was no question of law that was not well settled, nor anything that the Court of Appeals had jurisdiction to review.

The Appellate Division were not *divided*, but *unanimous* in the opinion that the orders of Special Term should be reversed.

LVII.

The rights of the owner in fee of the land were valuable.

It is not necessary to be an expert to know, what everybody knows, that property with the privileges and commercial environments of this property, has substantial value. Upon the facts proved there could be no doubt that the property was valuable. A single load of sand or gravel in a large City is worth more than six cents. There were thousands of loads which the owner had the right to remove and sell that are taken in this proceeding.

Williams v. Kenney, 14 Barb. (N. Y.), 629.

The Appellate Division said: "We think the citation of authorities is unnecessary to demonstrate that the appellant was owner of valuable property, which consisted of the bed of Buffalo River."

Where the owner is entitled to substantial damages, nominal damages are not just compensation and a new appraisal should be directed.

The rights of the owner in fee of land under water are real and entitle the owner to a substantial award on their being taken by condemnation proceedings.

Matter of Brookfield, 176 N. Y. 138, 149.

Williams v. Mayor, etc., 105 N. Y. 419, 437.

If it had been proved, or if it could be assumed, that the stream was a public highway, the rights remaining in the owner of the soil were valuable and he was entitled to substantial compensation when the fee was taken.

Jackson v. Hathaway, 15 Johns., 447.

Williams v. Kenney, 14 Barb., 629.

Trustees v. A. & R. R. R. Co., 3 Hill (N. Y.), 567.

Etz v. Dailey, 20 Barb. (N. Y.), 32.

Coatsworth v. L. V. R'y. Co., 156 N. Y. 451.

Matter Brookfield, 176 N. Y. 138, 149.

He could build wharves on his own land.

Butler v. Frontier Tel. Co., 186 N. Y. 486.

Williams v. Mayor, etc. N. Y., 105 N. Y. 419, 437.
437.

Ryan v. Brown, 18 Mich., 209.

Docks and wharves are "aids to navigation," when outside the navigable channel.

The channel excavated to make the river navigable below the reservation line was 170 feet wide.

D. & H. Co. v. City of Buffalo, 39 App. Div., 333.

The near-by ship canal was 200 feet wide, as the City Engineer testified. There was plenty of room to build wharves and leave a channel as wide as it was below. (Record 42.)

If the stream had been a public highway (which is a question the commissioners were not authorized to try or determine) "the public right is one of passage," and nothing more, as in a common highway. It is called by the

cases as easement; and the proprietor has the right to use the land and water of the river in any way not inconsistent with this easement. If he make any erection rendering the passage of boats, etc. inconvenient or unsafe, he is guilty of a nuisance; and this is the only restriction which the law imposes upon him.

Chenango Bridge Co. v. Paige, 83 N. Y. 185.

The principal street in the City of Rochester crosses the Genesee River on a wide bridge, upon both sides of which large business structures have been erected which are among the most valuable property in the City.

The Rialto in Venice is still a busy mart and the shops and places for sale of merchandise upon it are valuable.

Docks, wharves and warehouses built upon land under water where vessels engaged in commerce may receive and deliver commodities are to be found in all business centers enjoying the benefits of water transportation all over the world and such property has substantial market value. Witnesses testified that there was a demand for such property in the locality where this is situated and that the value of dockage property was large and was worth more than dry land. Statement of Facts, *supra*. That such property has substantial value is matter of common knowledge.

It was proved that the right to build docks and wharves was valuable. The right to build them on the land under water belonged to Mr. Appleby, as owner of the soil and adjacent land.

Ryan v. Brown, 18 Mich., 209.

Chenango Bridge Co. v. Paige, 83 N. Y. 185.

Yates v. Milwaukee, 10 Wall., 497.

Jackson v. Hathaway, 15 Johns. (N. Y.) 447.

Butler v. Frontier Tel. Co., 186 N. Y. 486, 491.

Coatsworth v. L. V. R. R., 156 N. Y. 451.

In Williams v. Mayor, etc. of N. Y. (105 N. Y. 427) the Court said in respect to the owner of land under water: "It needed no authority from the State to erect wharves on its own land." And, on page 437 "The plaintiff, whose land will be taken away and his wharf right destroyed * * * is entitled to adequate compensation. * * * The

wharf property of citizens may be taken, but must be paid for fairly and in the ordinary manner.”

The right to build abutments for railroads on the land under water was proved to be valuable and the privileges of crossing by telephone and telegraph companies and pipe lines and streets is a valuable one.

In a large City, sand and gravel are valuable and a single load is worth more than six cents. The evidence shows that there were large quantities.

The City's engineer testified that filling was worth 40 cents a load. (P. 79.)

Even when an increased burden is imposed on the fee of a highway the owner of the fee is entitled to additional compensation.

Williams v. N. Y. C. R. R., 16 N. Y. 97.

Craig v. R. C. & C R. R., 39 N. Y. 457.

Reinnig v. N. Y. L. & W. R. R., 128 N. Y. 157, 167.

Osborne v. Auburn Tel. Co., 189 N. Y. 393.

City of Buffalo v. Pratt, 131 N. Y. 293, 299.

USES FOR THE LAND.

The possible uses for land are elements of value.

C. B. & Q. Ry. v. Chicago, 166 U. S., 226, 260.

Boom Co. v. Patterson, 98 U. S., 403, 408.

Young v. Harrison, 17 Ga., 30.

Godin v. C. & W. Canal Co., 18 Ohio St. 169.

Village College Pt., 2 Hun (N. Y.) 669.

Dickinson v. Inhabitants, 13 Gray (Mass.), 546.

In *People ex rel. L. V. Ry. Co. v. City of Buffalo*, (36 N. Y. Suppl. 191, 197; aff'd on opinion below in 86 Hun 618 and in 147 N. Y., 675) the Court said: “From the nature and condition of things there is a *strong probability amounting to a moral certainty*, that the work of rendering the *stream navigable* will be extended.” Also, p. 198: “*The proper use for the lands lying on the river is for docks or wharves * * **”

In *Boom Co. vs. Patterson*, (98 U. S., 403, 408) an eminent domain proceeding, Mr. Justice Field, in discussing value, said: “The inquiry in such cases must be what is

the property worth in the market, viewed not merely with reference to the uses to which it is at the time applied, but *with reference to the uses to which it is plainly adapted*, that is to say, *what is it worth from its availability for valuable uses*. Property is not to be deemed worthless, *because the owner allows it to go to waste, or to be regarded as valueless because he is unable to put it to any use*. Others may be able to use it. * * * Its capability of being made thus available *gives it a market value*."

The above language was used in the case of an island which was found by a jury to be worth \$300 as farm land and \$9,000 for log boom purposes.

Mr. Justice Field also says (p. 409): "The adaptability of the lands for the *purpose of a boom* was, therefore, a proper element for consideration in estimating the value of the lands condemned."

Mr. Justice Field stated the rule to be: "What is the value of the property for the most *advantageous* uses to which it may be applied?" The Court also cited 18 Ohio St. 169, where a railroad was taking a canal, and it was held that the rule of valuation was not what was the interest of the canal company worth for *canal purposes* only, but generally *for any and all uses*. Also that in 17 Ga. 30, the correct rule was followed when it was held that the value of the land was *not what was it worth for agricultural or productive purposes*, but for any or all purposes, and especially its value for a *bridge site*.

In *Young v. Harrison*, (17 Ga. 30) cited by Mr. Justice Field in 98 U. S. 463, as laying down the correct rule, it is held: "That the value and damage, at the time the land was taken, was the thing to be ascertained; *but that to discover this the jury were authorized to look to the prospective value of the property as a bridge site and to take that into consideration also in determining what it was then worth*."

In the same case it is said: "An owner of land, *peculiarly situated* by reason of its *proximity to some great city* or great work of internal improvement, *may look into the future* and see that it will, at some distant day, become extremely valuable by reason of its situation, and that none other can be procured for the purpose for which he anticipates that it will be needed. * * * *Can he have just compensation unless reference is had to the prospec-*

tive value of the land, and unless that is to some extent at least, taken into account?"

The Court of Appeals (P. 128), in speaking of the reasons advanced by the owners' witnesses for their opinions as to value, said: "Those theories are more or less speculative." On the other hand, the Appellate Division (P. 122), after enumerating various uses which would be valuable to the owner, said: "If the fee of the bed of the river in question is of no value, why does the City of Buffalo seek to acquire the same? *The evidence shows conclusively that such property is valuable*; the exact value may be difficult to determine but that it is *more than nominal is conclusively established*."

Uses for the river were no more "speculative" than as to the adjacent vacant uplands, which were conceded by all witnesses to be worth several thousand dollars per acre (P. 61). That the uses which the owners' witnesses mentioned were not "speculative" is shown by the City's proofs in the case of *People ex rel. L. V. Ry. Co. v. City of Buffalo* (36 N. Y. Supp. 191, 197; aff'd 147 N. Y., 676) where the Court said: "From the nature and condition of things there is a *strong probability amounting to a moral certainty*, that the work of rendering the stream navigable will be extended so as to reach the relator's land." Also, (P. 198) "*The proper use for the lands lying on the river is for docks or wharves. * * **"

The proof showed that wharves would be worth a large sum over the cost of improvement which the owner could make.

Any real property which may be rendered productive is valuable though the owner may not have personal use for it. He may realize the value by lease or sale. Were it not so a great part of the real estate in cities, universally known to have market value, could be adjudged to be without value on the ground that the owner did not have use for it.

The Court of Appeals apparently followed some of the same misleading theories of the City's witnesses that confused the commissioners, viz., that there were no uses to which the bed of the stream could be put.

City's witness Gurney testified (P. 67): "I have taken nothing into consideration, *not the possibilities of what it might be used for*; only what the bed of the river is worth.

I have assumed there was no use to which it could be put." Also, (P. 66) "*In my estimate of values what I did consider was, that the land could not be used which was covered with water, and therefore of no value; it could not be used for any purpose. * * I don't know of any use to which a highway, or the land in a highway, can be put by the owner of the bare fee, which is disconnected in ownership from the abutting property. The case of the Buffalo R., I should say, is a parallel case, and the bed of the river is separate in ownership from the banks and is of no value; that is what I mean to testify to.*"

City's witness Boechat (P. 90) testified: "*My opinion of value there is based on the assumption that the owner of the bed of the river has no more rights than any other loyal citizen. I don't grant that the owner of the fee of the stream has any rights.*" Also, "*When I said that in my opinion the bed of a stream had no value, I meant it could not be utilized for any purpose.*"

City's witness Griffin (P. 73) testified: "*I don't consider any of its possibilities; if I had a man waiting there to give me the bottom of that river, I would still say it had no value.*" Also, (P. 75) The City asked of its witness the following question: "*Q. Now, assuming, Mr. Griffin, that this is a natural water course, the Buffalo R., and the water must continue to flow over the bed in the future, as it has in the past, what then would be the value of the river? A. No value.*" Also, (P. 73) "*That is my own opinion of the lands, not the market value. * * * Market value is based entirely on the earning capacity of land.*" He testified that if the same rights existed in that river as in lands under water granted by the State it would have value (P. 75). The City's witnesses' estimate of value was based largely on *their* theory of what the *law* was as to public highways (not as the law was in fact) and that the Ogden Co. was not the owner of the fee and had no valuable rights in the stream. This is shown by some of the following quotations:

City's witness Boechat (P. 87) testified: "*As to Cazenovia Creek, I don't think its bed had no value. It is a private stream. I presume it has value. I am just keeping in mind Buffalo Creek, nothing else but Buffalo Creek. I think Cazenovia Creek is different than Buffalo Creek. It is always considered different. I look at Cazenovia*

Creek in a different light from what I do Buffalo Creek because of the fact that the titles in Buffalo Creek *run to the bank* of the creek and the *titles* in Cazenovia Creek *run to the stream.*"

City's witness Hammersmith (P. 69) described the character and location of Cazenovia Creek, which is shown on City's Map Exhibit 2 as entering Buffalo River near Seneca St. He said: "Cazenovia Creek comes into Buffalo Creek at the Park Road. * * * It is almost as large as Buffalo R. is above that point. * * * At the point it comes into the River, it is about 250 feet wide."

City's witness Griffin (P. 75) also testified: "*I have known of sales of waterways where they were valuable. * * * At the foot of Georgia St. and Jersey St. they had great value; also on the Niagara R. between here and Tonawanda, where they paid the State quite a large sum of money for riparian rights. The land that the Lehigh Valley has taken at Lake Erie; also the Steel Works. That is going to be very valuable.*"

City's witness Gurney also testified (P. 66): "*I don't know of any use to which a highway, or the land in a highway, can be put by the owner of the bare fee where it is disconnected in ownership from the abutting property. The case of the Buffalo R., I should say, is a parallel case, and the bed of the river is separate in ownership from the banks and is of no value. That is what I mean to testify to. Those cases where I said in Niagara River and elsewhere that the right to dock out is of value is where the State, in the exercise of its sovereignty, has granted the right to construct piers out into the navigable waters of the stream or lake.*"

New York State owned that land under water in Niagara River, it was part of the "Mile Strip" granted to it by Massachusetts, under the Convention of 1786. New York also acquired the Indian title to those lands. The State as fee owner sold those lands under water to the adjacent upland owners on condition that they were to be filled in or docked in aid of navigation.

As to these lands under waters of Niagara River, the State's title was no different from that of the Ogden Land Co. in Buffalo River, except the latter owned adjacent upland. The City's witnesses were in error as to the title and rights, questions with which they had nothing to do.

The City's witnesses based their opinions of value on the theory that no greater use could be made of the bed of a stream than the bed of a street; and that the owner of the fee had no right to use any of the lands under water (even outside of any proposed navigable channel the channel as it was did not average over 40 feet wide) or that there were no uses to which the lands could be put; or that to buy it meant a lawsuit (P. 58, 59); also that the Ogden Co. had *no greater rights than any other citizen* (P. 65). Their theories were erroneous. The following valuable and possible *uses* were as absolutely *certain* as is the future use of any vacant lands, viz.:

1. Canals and wharves or docks could be constructed.

Docks and canals are needed and there is a demand for them in that vicinity. (See "Statement of Facts.") The City proposes to dig a navigable channel, or canal, that is what others in that vicinity have done, viz: The City, The Lehigh Valley R. R., and the Lackawanna Steel Co. and others (P. 83, 73, and 36 N. Y. Supp. 191). The private owner might do the same at great profit. Dockage property is worth along the River from \$300 to \$1,000 per front foot. (P. 61.) The land is practically level with a slight slope to the bank. (P. 77). The banks average about 5 feet high. (P. 78).

The City's engineer testified (P. 84) that: It costs not over \$70 per running foot (that is \$35 per dock foot on each side) to dredge a navigable channel 17 feet deep and 200 feet wide and build docks. If only 190 feet wide, as the City proposed to dredge it, the cost would be less. That leaves a profit of from \$530 to \$1,930 per running foot of canal, as the first section of the stream *averages* 270 wide, as scaled on City's map Ex. 2 (P. 42). Exhibit 2 the City Engineer testified represented only the "Lands under water" (P. 38) and hence did not include the shores and banks. The Ogden Co. had additional adjacent land and could buy more with the above margin of profit. The City engineer said the *average* channel there was 40 feet wide and 4½ feet deep. (P. 81.) It would have saved just that much for dredging over the cost he mentioned, viz., the cubic contents of such existing channel, and the excavated material could have been used to fill in

the abandoned channels (P. 83). (See 126 App. Div., 125) and to fill the shallow water and low land outside of the proposed 190 foot channel. The City proposed to excavate only 190 feet wide and the width of the channel lower down the river is only 170 feet.

(See D. & H. Canal Co. v. City of Buffalo, 39 App. Div., 333.)

Some dredging was done by private contract. (P. 83.)

The Blackwell (or City ship canal) alongside of Buffalo River and the Lehigh Valley and Lackawanna Steel Company canals are all *artificial*. (City Engineer, pp. 83-84) and not over 200 feet wide including docks.

Buffalo R. from its mouth to Hamburg St. is nothing more than an *artificial* canal. It has all been dredged a uniform width and is lined with docks on each side. In its natural state it was not navigable.

The City's witnesses, who conceded that the right to build docks was very valuable, thought that the owner of the fee did not have that right without a grant from the State. (P. 66, 75). The State could not grant what it did not own. The Ogden Co. already owned the land and needed no grant from the State.

2. For the extensions of streets and the erection of buildings adjacent to the bridges and over the bed and banks of the stream, as has been done over the Genesee River in Rochester, N. Y. and in many other places. It was the bed of the Genesee River which was in litigation in those well-known cases of *Starr v. Child*, 4 Hill 369 and *Child v. Starr*, 5 Denio, 599. The abandoned channels would make valuable dumping grounds for City refuse and dirt from cellar excavations, saving cartage.

Also the abandoned channels might be filled and used for building purposes if not wanted for canals. City's witness *Farler* (P. 55) testified: "The river has worked a *new channel* through that part of the territory."

Mr. Davey testified (P. 103): "In places the stream has changed its course and bed."

City Witness Griffin testified (P. 71): "I know in a general way of the law permitting the making of *new cuts* for the river to run in * * * I know of the acts permitting the *exchange* of lands" (Chap. 199 Laws 1901).

As the Presiding Justice of the Appellate Division said

on the argument: "Some of the most valuable property in the City of Rochester, is *over* the bed of Genesee River."

The map (City Ex. 2) shows many streets which could be extended across the River. Land extends indefinitely upwards and downwards.

Butler v. Frontier Tel. Co., 186 N. Y. 486, 492.

1 Burrill's Law Dict., 306.

3. For railroad and street bridges and piers.

Young v. Harrison, 17 Ga. 30.

The City Engineer testified that one railroad could have saved \$25,000 on a bridge with piers in the stream over a single span bridge. (P. 80.)

The map (Exhibit 2) shows many railroads along the banks and crossing the stream they would be probable customers. They own nearly all of Buffalo's water front and dockage because they know to what uses such land can be put.

4. For telegraph and telephone poles and wires.

Butler v. Frontier Tel. Co., 186 N. Y. 486, 492.

It is only recently this has been considered a valuable use.

In a recent case in Buffalo, a jury rendered a verdict of \$25 per pole for the right to cross swamp land along Niagara River.

5. For pipe lines for natural and artificial gas, oil and water.

There is much natural gas in and near Buffalo, and many pipe lines must cross.

The City bought what is now, by change of the channel, an "island" for a municipal gas plant. (P. 74-5.) It was originally only a point of land.

6. For tunnels and subways.

New York City, Detroit and Chicago and other places have important *tunnels* under rivers, and streets.

7. For water and water power.

A new hydraulic power and drainage canal is proposed to cross the upper part of the stream and empty into Lake Ontario. The plan has been approved by many eminent engineers and is not half as "speculative" as the development of Niagara power was 25 years ago.

8. To erect buildings upon the abandoned parts of the channels.

That has been done in the case of Little Buffalo Creek, a branch of Buffalo R. City's witness, Boechat, testified (P. 88): "That Little Buffalo Creek was a stream as large as Buffalo River is above Seneca St. I guess it was deeper at some points because it was a mill race * * * school No. 5 stands over it now." Also, N. Y. C. R. R. Station on Exchange St. (P. 84). See also City of Buffalo v. Hoffeld, 6 N. Y. Misc. 197.

The channels have already changed greatly. (See City "Exhibit 6"—assessors' maps; also testimony of Davey and others P. 55, 74, 103.)

9. Sand and gravel are valuable.

W. H. Newerf, for City, testified (P. 62): "The bed of the river is a gravelly bottom; gravel and sand, etc. The stream has been gradually filling up the last ten years with *sand and gravel* that is brought down from the country."

City Engineer Norton, witness for City, testified (P. 81): "There is quite a *gravel* pile just below Seneca St. bridge."

P. 79: "* * * The rest of the bed of the river is clay and sand and gravel; sand and loam mostly."

Also, P. 78-9: That any earth filling near there was worth *40 cents per cubic yard*. Sand and gravel in a City, for building purposes, is of course worth more than ordinary earth.

Assuming that the river were a public highway (which it is not), the owner of the fee of the land, even in a highway over land, owns the sand, gravel and other materials

therein, and they are valuable, especially in a City and cannot be taken from the owner without compensation.

Williams v. Kenney, 14 Barb. (N. Y.) 629.

Olcott v. Supervisors, 16 Wallace, 678, 697.

Fisher v. City of Rochester, 6 Lans. (N. Y.) 225.

Town of C. v. Medina Quarry Co., 102 N. Y. App. Div., 217.

Jackson v. Hathaway, 15 John. (N. Y.), 447.

Platt v. Village O., 88 N. Y., App. Div., 195.

Gidney v. Earl, 12 Wend., 98.

He who owns the soil, or surface of the ground, owns everything upon, above or below it to an indefinite distance.

"Cujus est solum, ejus est usque ad coelum et ad inferos."

Butler v. Frontier Tel. Co., 186 N. Y., 486, 491.

1 Burrill's Law Dict. 306.

Most of the coarse sand and gravel used in the City of Buffalo is taken from the bottom of Niagara River by dredges or "sand suckers" and the fine sand comes by boat and rail from Canada. Our sand and gravel being nearer to its place of use, a single yard is worth more than 6 cents.

In Fisher v. City of Rochester (6 Lansing (N. Y.), 225) it was held: "The City cannot credit itself with materials taken from the street by its contractor. *They belong to the owner of the fee of the street.*"

In Williams v. Kenney (14 Barb. (N. Y.), 629), in speaking of a highway, it was said: "The land was his, subject only to the public easement" and the *owner of the soil could sell* it even in front of another's premises.

10. To straighten the stream and exchange land for other land, just as the city proposes to do.

City of Buffalo v. D. L. & W. R. R., 126 N. Y. Ap. Div. 125, 128.

City's witness Griffin testified: "I know of the act permitting the *exchange* of lands." He referred to Chap. 199, Laws 1901, passed in March 1901, read in evidence at P. 106. The order appointing commissioners was made June 5, 1901. Chapter 199 referred to "lands about to be *acquired*" by the City.

Where the navigable channel is made 190 feet wide the strips and pieces between that line and the lot lines would also be available for *exchange or sale*.

11. For railroad tracks.

City's Map Exhibit 2 shows railroads all along the banks, as well as several crossing the stream. In straightening the river there will be various changed channels, and the river has already changed its course and bed in several places. (P. 74, 103. See Exhibit 6.)

The Florida East Coast R. R. extension runs for miles through water. The New York Central R. R. and West Shore R. R. are built in many places in the waters of the Hudson R.

12. The reversionary interest in a highway is valuable.

(If Buffalo R. were a highway, which we deny.)

Olcott v. Supervisors, 16 Wallace (N. Y.) 678.

Coatsworth v. L. V. Ry. Co., 156 N. Y. 451.

Jackson v. Hathaway, 15 John (N. Y.) 448, 452.

Gidney v. Earl, 12 Wend. (N. Y.) 98.

Heard v. City of Brooklyn, 60 N. Y. 242.

An erroneous measure of compensation was adopted by the Appraisal commissioners.

They should have applied the rule that "in no case should an award be made for less than the *value of the property* actually taken by condemnation."

Matter Com. Public Works, 135 N. Y. App. Div., 561, 569.

Matter City of N. Y., 190 N. Y. 350.

Heyward v. Mayor N. Y., 7 N. Y. 314, 325.

The order provided (P. 10): "They are hereby appointed commissioners to ascertain the *just compensation* to be made to the owners, mortgagees and persons interested, for the *lands* to be taken, *as described* by the notices given by the petitioner herein."

The order did not authorize them to decide any *legal* questions, but only to ascertain the "just compensation"

for the *lands*.

Com'r Maischoss, in an affidavit asking extra fees, says (P. 20): " * * * That much *time* and great care was taken in the preparation of the commissioners' report and his examination of the *legal questions involved* * * * ."

What were the "*legal*" questions involved? Not the value of the land and damages but questions of title, boundaries, &c., and more especially the cases as to old N. Y. City streets. On P. 55 of the City's Court of Appeals brief, they say: "If, as we contend in the 1st point, that the *State of N. Y. is owner* of the lands under the waters of Buffalo R., no legal error was committed * * * ."

The commissioners could not decide that question. The owner had a right to a jury trial on that question. They had no jurisdiction to decide legal questions of *title*, that is, who owned the land, etc., nor what all the maps and deeds offered by the City tended to prove.

In Matter Com. of Public Works (135 N. Y. App. Div., 561) it is said: "Where there is a dispute as to the ownership of a parcel condemned, the commissioners should ascertain and report its *value* * * * as they cannot determine a question of *title*."

See also Matter of City of N. Y., 190 N. Y. 350.

The ownership of the land could not be disputed.

Vill. Olean v. Steyner, 135 N. Y. 341.

Matter Yonkers, 117 N. Y., 572.

City of Geneva v. Henson, 195 N. Y. 447, 454.

Nor had the commissioners any power to settle the *boundaries* of the land, or the owners' right in the stream to build docks therein, etc. (P. 75).

The City, before the commissioners (as in their brief before the Court of Appeals) kept urging that the land had no value because they say "The Ogden Co. owns only the *naked*, legal title to the fee of the land, subject to perpetual public easements and servitudes, which deprive the owner of any use or enjoyment of the land, and it is entitled *only to nominal damages* for the *extinguishment* of its *theoretical* right, and not to substantial damages as for the taking of *valuable, practical properties*." (Point 4, City Court of Appeals brief.) Is that the *fee*?

To sustain this contention and that "The *rule of damages* adopted by a long line of decisions in this State on the taking of the fee of a highway is that the *owner of such*

fee is entitled to nominal damages only," the City cited In Re 17th St., 1 Wendel 262; Lewis St., 2 Wend. 472; 32nd St., 19 Wend. 128; Livingston v. Mayor, 8 Wend. 58 & other cases relating to old N. Y. City streets.

In City of Buffalo v. Pratt, (131 N. Y. 293, 296-7) the Court of Appeals distinguished that line of cases and pointed out that they were based on local statutes and were not applicable even to the streets, (not to mention rivers) in the City of Buffalo. In the Pratt case, the original award was six cents, but after the report was set aside, on a new appraisal, about \$6,000. was awarded to Mr. Pratt (p. 47).

From the nature of an eminent domain proceeding, the City could not claim to own a highway easement, nor dispute the owner's title. If any one else owned any interest in the fee, the award should have included such interest.

In Village Olean v. Steyner (135 N. Y. 341) it was held: "A municipality by commencing proceedings under its charter to acquire land for the purpose of a street *admits* the land-owner's rights, and *it may not claim in such proceedings* that the land has been dedicated by the owner to the public use as a *highway*."

In Matter City of Yonkers (117 N. Y. 572) the Court said: "*These proceedings are entirely inappropriate for the purpose of trying the question of title or for testing the right of the City to an easement.*"

See also Bennett v. Boyle, 40 Barb. (N. Y.) 551.

In Jackson v. Hathaway (a leading case), 15 John (N. Y.) 448, 453, it is said: "*Highways are regarded in our law as easements. The public acquire no more than the right of way * *. The former proprietor still retains his exclusive right in all mines, quarries, springs of water, timber and earth for every purpose not incompatible with the public right of way. The person in whom the fee of the road is may maintain trespass, or ejectment, or waste. (Burr 143; 2 Stra. 1004; 1 Wel. 107; 6 East. 154; 2 Johns. Rep. 363; 6 Mass. Rep. 454). But when the sovereign chooses to discontinue or abandon the right of way, the entire and exclusive enjoyment reverts to the proprietor of the soil.*"

Also, "*That the original owner has also a right to retain his estate in the road, when he sells the adjacent lands, is a proposition too plain to be denied.*" (Id.)

In *Olcott v. Supervisors*, 16 Wallace 679, it is said: "Even in regard to common roads, generally, the public has no ownership of the Soil, no right of possession or occupation. It has a mere right of passage."

In *Village Olean v. Steyner* (135 N. Y. 347) it was said: "In the case of City streets, where under the statute the fee is taken, we have recently held that *substantial damages should be awarded* (*City of Buffalo v. Pratt*, 131 N. Y. 297), but here the fee is not taken, but an easement for a highway only, which is merely the equivalent of the private easement displaced. The charge alters the control, but does not increase the burden."

LVIII.

The owner was entitled to a substantial award to compensate him for the depreciation in value of his adjoining land by severance from the property taken by this proceeding.

Matter of Utica &c. R. R. Co., 56 Barb. (N. Y.) 456.

Henderson v. N. Y. C. R. R. Co., 78 N. Y. 433.

South Buffalo Ry. Co v. Kirkover, 176 N. Y. 301.

Banks v. Colgate, 67 N. Y. 512.

Dockage property in that vicinity is worth from \$200 to \$1000 a foot front, while the land fronting on streets merely, without water frontage, is worth only \$40 to \$60 a foot. Taking the rights in the stream reduces the value of adjacent land to that of land without water frontage. The river can be excavated and docked for less than \$35 a foot front. The City's engineer and witness so testified.

Statement of facts, *supra*, under head of "Commercial Environment & Cost to Improve."

The river needs less excavation than the canals through dry land.

The river has been excavated and docked from its mouth to Hamburg street, about 2 miles, and by private contract has been excavated above, where it is worth \$200 to \$300

a foot, and the evidence shows that there is nothing to prevent further improvements of that kind.

Upon the uncontradicted facts proved, the commercial environment, demands for and sales of property under water for purposes for which the property in question is peculiarly adapted, no reasonable mind could reach but the one conclusion that the property has substantial value. The facts testified to were those known to the witnesses and were not mere opinions. The inferences that must be drawn from such evidence conclusively establish the fact as matter of law.

Matter of Totten, 179 N. Y. 116.

Upon that fact and proof of ownership, which could not be disputed in this proceeding, the provision of the Constitution entitles the owner to an award of substantial damages. The reversal of the order confirming the report awarding only nominal damages was correct as matter of law. The proofs showed that the value of the property was substantial. A nominal award was not the just compensation the law requires.

If the value of the property were only six cents, the City would not have incurred the expense of appraisal or taken the case to the Court of Appeals to secure it and the Plaintiff in Error would not have come here to protect his rights. The opinions of both parties in respect to value are shown by the strenuousness of the attack and defense.

It would not have justified the trouble of securing from the Legislature the Charter Amendment (Ch. 199, Laws of 1901) permitting an exchange for other lands "of equal value" if it was worth only six cents.

LIX.

This proceeding either takes the property in fee simple or it does not. If in fee simple, the award should be for the property without deduction for any interest, public or private.

Seton v. City of N. Y. 130 App. Div. 154-5.
Matter of City of N. Y., 190 N. Y. 350.
Code C. P. (Sec. 3370).

If it is taken subject to any adverse rights or claims, the interest taken or excepted has not been sufficiently defined to be the subject of appraisal.

There must be no uncertainty in the description of the property to be taken, nor in the degree of interest to be acquired.

Matter of Water Com'rs, 96 N. Y. 361.

Bell Tel. Co. v. Parker, 187 N. Y. 299, 303.

Matter N. Y. C., 70 N. Y. 191.

Code Civ. Pro. (Sec. 3360).

If only Mr. Appleby's interest is taken, in order to appraise the whole property, it must be conceded that he owns the whole. If he owns less than the whole, what part of it is his has not been specified, and the interest to be appraised has not been described, and what property was to be appraised was left uncertain.

The certified questions fail to make any statement of facts in relation to the title or to defects in it if there were any.

In *Heywood v. Mayor of N. Y.* (7 N. Y. 314) the Court said: "*Certain it is that no honest legislature or just government would be guilty of the moral piracy of failing to recognize and fulfill the duty of making just compensation where private property should be taken for public use.*"

Where the land is taken in fee "there could be no just measure of compensation but the *whole value of the lands* with the *damages* for relinquishing them." *Id.* 325.

LX.

The Description.

"Due process of law" requires a certain and definite description of the property to be taken, otherwise the appraisers and others may interpret the same so that property may be taken for which no compensation is made. The description is the very foundation of the proceeding. "Lands under the waters of Buffalo River" is not a proper description. It is not only indefinite and uncertain but variable, according to the stage of the water. No center line, no width, no metes and bounds are given, nor the stage of the water, nor the quantity of land. The objec-

tion was taken in the Courts below, Record page 34, 128.

Matter N. Y. C. R. R., 70 N. Y. 191, 193.

Matter Water Com'rs, 96 N. Y. 351.

Bell Tel. Co. v. Parker, 187 N. Y. 299, 303.

M. E. Co. v. Dominick, 55 Hun 199.

Condemnation Law, C. C. Pro. Sec. 3360, subd. 2.

Lawton v. City of New Rochelle, 114 A. D. 883, 884.

Matter DeCamp. 19 N. Y. App. Div. 564.

The City succeeded in making the commissioners believe that "lands under water" included the banks and other dry lands.

In Bell Tel. Co. v. Parker, 187 N. Y. 299, 303, it is said: "The only property which can lawfully be taken is the precise property designated in the petition". (People v. Vill. Whitneys Point, 102 N. Y. 81)".

Lawton v. City of New Rochelle, 114 App. Div. (N. Y.) 884, holds that the "due process of law" provided for in Sec. 6, Art. 1, N. Y. Constitution requires both in taxation and eminent domain proceedings a proper description, and cites 70 N. Y. 191; 90 N. Y. 342; 121 N. Y. 259.

The Buffalo Charter (Chap. 105, Laws 1891, Title 20, Secs. 418, 420) prescribes that the land shall be "described" and "to ascertain the *just compensation* to be made for *such lands*."

The Condemnation Law (Code Civ. Pro. Sec. 3360, subd. 2) provides *how* the lands shall be described, viz.:—

A "specific description of the property to be condemned, and its location by *metes and bounds* with reasonable certainty."

See also Code C. P. Secs. 3369, 3370.

The indefinite description caused many of the erroneous rulings made by the commissioners.

The Court acquired no jurisdiction until the Statutes were complied with.

When property is taken in invitum every provision of law having a semblance of benefit to the owner must be strictly followed.

To take more land than necessary for a public highway would not only be unjust but unconstitutional. Highways whether roads or canals are always laid out a specified width and the City proposed to dredge 190 feet wide. In the D. & H. Co. case (39 A. D. 333) the channel was only 170 feet wide, lower down the stream.

In Matter N. Y. C. R. R., (70 N. Y. 191) it is held: "The *petition* must contain such a description of the land sought to be condemned as will show its location and the *boundaries* thereof. *A defective description cannot be remedied by a reference in the petition to a deed.* In such proceedings *extreme accuracy is essential* to preserve the rights of all the parties."

Also, (P. 194): "Without this, the owner of land cannot know what portion of his land is required; *nor the commissioners what damages* to appraise; nor the petitioner the precise *boundaries* after the same is acquired."

The above case (70 N. Y. 191) is cited in 90 N. Y. 349; 121 N. Y. 266; 96 N. Y. 357; 36 App. Div. 592; 187 N. Y. 299, 303 and in many other cases and in many text books and cases in other states.

In Matter Water Com'rs (96 N. Y. 351) it is said: "*There must be no uncertainty in the description* of the property to be taken nor in the degree of *interest* to be acquired."

In 187 N. Y. 305, it is said: "The quantity must be *definitely* ascertained and *described*, so that the owner may know how much he has lost and what he is entitled to be compensated for."

In M. E. L. Co. v. Dominick, 55 Hun (N. Y.) 199, it is said: "To condemn property rights *extreme accuracy* is required in the *description* of the property sought to be acquired, and there must be no uncertainty in such description or in the degree of interest sought to be acquired"; also, it was said: "The property owners' rights should *not be left even to doubtful*, though plausible, construction. (86 Hun 457)".

The "bed of a stream does not include its "banks", nor are the banks "lands under water".

In Bell Tel. Co. v. Parker (187 N. Y. 303) it is said: "The property or interest to be acquired must be ascertainable from the description thereof *in the petition itself without reference to extrinsic facts.*" Citing Matter N. Y. C., 70 N. Y. 191; Matter Water Com'rs, 96 N. Y. 351.

The description controls not only the amount of the award for the property taken but also shows what is left.

The City Charter provides (Chap. 105, Laws 1891, Title 20, Sec. 418) " * * And describe the lands intended to be

taken (see also Sec. 420) * * shall give notice that the City has determined to take the lands therein *described* for the purpose stated * * to ascertain the just compensation to be made for *such lands* * * .”

How the land is to be described is provided in the Condemnation Law, (Code Civ. Pro. Sec. 3360, subd. 2) a “*specific description* of the property to be condemned, and its location, by *metes and bounds*, with reasonable certainty.”

(See also C. C. Pro. Sec. 3369, 3370).

Having stated in the notices of appeal (P. 2), as permitted by the Code Civ. Proc. Secs. 3375, 1358, that we would seek to review the previous orders and proceedings, we had the right to question the description, if it may not be questioned at any time.

(See also P. 34 where objections were taken).

City Engineer Bardol testified: “I have an accurate survey; they are on a map I have on a good deal larger scale but they are not on that map (Ex. 2) * *. This one has a slight defect * *.” (P. 38).

City Engineer Norton testified: “I didn’t make this map (Ex. 2). I made the surveys for a *large portion* of it from which it is *reduced*, and *I have not compared it with my surveys* in any way.” (P. 80)

The necessity for a proper description, and the uncertainty of the description, is well shown by the claims of the City as to what the description includes, and by the Court of Appeals opinion.

Until it was shown by Surveyor Davey’s testimony (P. 103-105) and the original field notes and map that the lots near the river were bounded by lines running certain courses and distances between stakes placed back on the banks of the river, which left a strip averging about 12 or 15 feet in width, and in many places more, between the lot lines and the margin of the stream, as also shown by the red and black lines on the original map of Emslie’s survey, (Map Ex. 7, P. 106) the City relied on the claim that “Lands under the waters” included all that the Ogden Co. owned. They then shifted their claims.

The testimony of the City as to value was all based on the hypothesis that the lots were bounded on the *water* and that the Ogden Co. had no adjacent land and no riparian rights.

Even if the State had owned the lands under water (the State did not) and the 12, or 15, foot strip of upland and accretions alone lay between the lot lines and the water, the Ogden Co. would have been entitled to the grant.

Banks v. Colgate, 67 N. Y. 512, 516.

All of the City's testimony referred to the "bed" of the river as meaning the same thing as "lands under water", (P. 38) but later sought to include the *banks* and the strip, and abandoned channels, accretions, etc., in that description.

An examination of the sample sheet from the City's Assessors Maps (City's Ex. 6 P. 119) should alone prove the indefiniteness of the description. That map shows the *bed* of the river in four different places (4 surveys) viz. in 1854, 1870, 1890 and 1902. Which "bed" is intended by "Lands under the Waters of Buffalo River"?

The language used in matter N. Y. C. R. R., (70 N. Y. 194) would seem conclusive, viz.: "without this, the owner of land cannot know what portion of his land is required; nor the commissioners what damages to appraise; nor the petitioner the precise boundaries of the land, if the same is acquired".

The commissioners used the map "Exhibit 2" to piece out the description, (P. 16) That was improper. That map contained no measurements of any kind so it could not aid the description in the notice of intention. It was not a part of the moving papers on which the order appointing commissioners was made.

Bell Tel. Co. v. Parker, 187 N. Y. 299, 303.

Matter N. Y. C. R. R., 70 N. Y. 191, where it is said: "The petition must contain such a description of the land sought to be condemned as will show its location and the boundaries thereof. A defective description cannot be remedied by a reference in the petition to a deed."

There was no petition and the Notice of Intention did not refer to Exhibit 2, nor to any other map.

The map (Ex. 2) itself was not properly proven to be a correct map to authorize its use to amplify the description; it did not give metes or bounds, nor acreage—only a scale of 300 feet to the inch. It was not made from actual surveys but was deduced from a larger map (not offered in evidence). The correctness of the survey from which the latter map was made was not proven, nor the date thereof. (P. 38, 81).

The Court of Appeals said (P. 128): "Some questions appear to have been raised in the Appellate Division with reference to the sufficiency of the *description* of the *premises* to be acquired and with reference to other details of procedure, which were not raised in *timely* manner, and which cannot now be considered."

Again the Court erred. The questions were raised just as quickly as the City made adverse claims before the Commissioners. (P. 92, 34). On the papers presented to the Special Term, on the motion to appoint commissioners (viz., based only on the notices of intention and determination, proofs of service thereof and notice of motion); *there was no petition* or any allegations to deny so as to raise an issue. On those papers the owner had a right to presume that the Commissioners would attempt nothing except to appraise the *value of the land*;

Matter City of N. Y., 190 N. Y. 350.

Matter Com. Public Works, 135 N. Y. App. Div. 561, 569.

and that the ownership of the fee and of adjacent lands, and other facts were *undisputed*, and that the description meant only "lands under water" and not also lands not under water.

Matter Yonkers, 117 N. Y. 572.

Village Olean v. Steyner, 135 N. Y. 341.

The City's Chief Engineer, Bardol, testified (P. 38); The map (Ex. 2) correctly shows the land as described, "The lands under water etc." That map was not before the Court on the motion to appoint commissioners.

There having been no allegations of fact the owner was justified in relying upon the above and like authorities and in assuming that the City would not, contrary to fact, claim that "lands under water" included lands not under water; or that the stream was navigable and a public highway; (a fact not alleged) or that the owner's rights in the stream were no different from that of any other citizen, instead of being a fee; or that although owning the soil he had no right to construct docks thereon; or that he had only "a naked fee", "an intangible right"; or that it was precisely like a public street; or that the State owned the land; or that there was no land adjacent to "land under waters" owned by the Ogden Land Co., etc. Just as quickly as the City began to offer deeds and maps and testimony

and evidence on the above questions, the owner took his objections and exceptions. (P. 92). How much more "timely" could the objections have been raised, even if we were to assume that a petition containing the essential facts was not essential to jurisdiction and due process of law? Objections to the description of the property and procedure followed are always available in proceedings in invitum.

The Appellate Division also overlooked what we have mentioned when they said: "Pursuant to the notice for the *appointment of commissioners*, the appellant appeared but failed to raise any objection to the regularity of the proceeding, and therefore, we think, is estopped from raising any such objection upon this appeal * * so that it is considered that the only question presented by the appeal is the adequacy of the award." Outside of there being no petition and a defective description all of the irregularities occurred after the appointment of commissioners.

In addition, to the objections and to evidence, etc., before referred to, the owner filed *exceptions* to the report (P. 17, 107) and moved to set aside the report.

On the motion to set aside the report objections were also taken to the sufficiency of the description, and the want of a petition (P. 34).

The refusal to set aside the report was appealed from (P. 2). If the City had interpreted the description "Lands under the waters" as the owner did, and as its Chief Engineer did, (P. 38) all the deeds and maps, etc., objected to would not have been offered in evidence and the award would have been different.

LXI.

No proceedings except those now under review have been taken by the City of Buffalo to acquire the lands affected by this proceeding. No conveyance of them has been executed to the City. These proceedings were instituted to acquire what the City did not own. In settling the disputes between New York and Massachusetts, the pre-emption right to the Buffalo Creek Indian Reservation and other lands was conceded to be in Massachusetts and by deed New York confirmed all right, title and interest in said Reservation in Massachusetts, which that state claimed under a grant (made in 1628) from the Crown of

Great Britain to the Colony of Massachusetts Bay. About 1826 (confirmed in 1838 or 1842,) the Ogden Land Co. exercised the preemptive right, which it acquired by mesne conveyances from Massachusetts, and through treaty and deed (1826) duly acquired all the Indian title, and the Indians surrendered possession to the Ogden Land Co.

McKeon v. Tillotson, 1 Keyes (N. Y.) 170-1.

People S. N. Y. v. Snyder, 41 N. Y. 397.

The United States could not impair the title of the States, or purchasers from the States, of the preemptive right in Indian lands.

Seneca Nation v. Christie, 126 N. Y. 143.

The Buffalo Creek Indian Reservation was never ceded to the United States. It never had or claimed title to it. By the purchase from Massachusetts and the Indians, the Ogden Co. obtained a valid title. *Id.* 147.

The United States never had or claimed title or jurisdiction.

Seneca Nation of Indians v. Appleby, 122 N. Y. Supp. 177.

146 N. Y. State Reporter.

"Where a patent or grant conveys a tract of land by metes and bounds, the land under water, as well as other land will pass, if the land under water lies within the bounds of the grant."

Rogers v. Jones, 1 Wendell (N. Y.) 237.

Buffalo R., within the B. Ck. Indian Reservation, was included within the metes and bounds of the grant from N. Y. to Mass. and from Mass. (by mesne conveyances) to the Ogden Land Co. There was no "reservation" or "exception" of the stream.

Gould v. Glass, 19 Barb. (N. Y.) 447, 458.

The grant (1628) from James I to the Colony of Mass. Bay, under which the State of Mass. acquired title, included in terms, *rivers*, etc. (P. 117) The State, through its Land Board and the Legislature, have made many grants of land under water, when the State *owned* such land.

Banks v. Colgate, 67 N. Y. 512.

But when land has once been granted the State ceases to own it, except as it reverts to it or is reacquired by due

process of law.

In 1786 the State of New York conveyed (confirmed) by metes and bounds to Massachusetts about 6 million acres of land in Western New York, including the Buffalo Creek Indian Reservation, that is, the pre-emptive right to purchase the Indian title (use, occupancy, etc.) except "sovereignty and jurisdiction". (P. 118).

Buffalo R. was not reserved or excepted from the grant, nor was it in any part navigable in fact or law, nor had any part of it, at the time of the grant, been declared by Statute "a public highway". After the grant, the Legislature could not constitutionally declare the Ogden Land Co.'s part of the river "a public highway" because the State did not own it.

Gilman v. Tucker, 128 N. Y. 190, 199, 203.

The later grant (1664) by Charles II to the Duke of York (spoken of as "conflicting" with the earlier one to Mass. Bay Colony) did not include any of the lands in Western N. Y. The two grants conflicted only as to lands between the Hudson and Connecticut rivers and elsewhere in New England and Eastern N. Y. Therefore, the title to Western N. Y. had been before in and remained in and was confirmed in Massachusetts, and *was not acquired from N. Y.* The latter only released claims to other land and quit claimed this land.

"Sovereignty and jurisdiction" granted by Mass. to N. Y. in the settlement, were no greater rights than those over land not under water. "Sovereignty", it has been said, includes only the rights of (1) Eminent domain; (2) Taxation; (3) Escheat; (4) Police power.

It is because the ownership is private that these eminent domain proceedings have been instituted by the City of Buffalo as they could not be if the ownership was in the State or the United States.

LXII.

The 14th amendment to the Constitution of the United States was violated by the judgment of the Court of Appeals and the previous proceedings.

In C. B. & Q. Ry. v. Chicago (166 U. S. 233) it is said in the opinion by Mr. Justice Harlan: "*The prohibitions of*

the 14th Amendment extended to all acts of the State, whether through its legislative, its executive or its judicial authorities."

It is also said that "due process of law" requires just compensation. It also cites Story on the Constitution to the effect that the right to appropriate private property must not be exercised without making due compensation for whatever is taken and that "due process of law" requires, first, the legislative act authorizing the appropriation pointing out how it may be made and how the compensation shall be assessed; and secondly, that the parties or officers proceeding to make the appropriation shall keep within the authority conferred, and observe every regulation which the act makes for the protection or in the interest of the property owner.

2 Story Const. Sec. 1956.

In the same case, it is said by Mr. Justice Brewer (p. 226, 259), referring to the opinion of Mr. Justice Harlan: "I approve that which is said in the first part of the opinion as to the potency of the 14th Amendment to restrain action by a state through either its legislative, executive or judicial departments, which deprives a party of his property without *due compensation*; also the ruling that due process *is not always satisfied by the mere form* of the proceeding, the fact of notice and a right to be heard, I agree to the proposition that a judgment of a State Court, *even if it be authorized by Statute*, whereby private property is taken for the State, or under its direction, for public use, *without compensation* made or secured to the owner, is, upon principle and authority, wanting in the due process of law required by the 14th Amendment to the Constitution of the *United States and the affirmance of such a judgment by the highest Court of the State is a denial by that State of a right secured to the owner by that instrument.*"

On the question of what is due compensation that case differs from ours in important particulars. In that case the fee was not taken. The opinion in that case states "No land as such" was taken. Only a right of passage over a railroad right of way was taken, leaving the ownership, possession and beneficial use in other respects undisturbed and the damages were assessed by a jury and the assess-

ment had not been set aside. In our case the assessment had been set aside by a competent tribunal, whose decision was not reviewable.

In *C. B. & Q. Ry. v. Chicago* (166 U. S. 254) it is said: "Every R. R. takes its right of way subject to the right of the public to extend the public highways and streets across such right of way."

Our property is taken in fee simple (*Matter of N. Y. C.*, 190 N. Y. 350); In *re Water Com'rs of Amsterdam*, 96 N. Y. 351) which includes title, the right of possession and the right to use for any purpose which may be lawful (*Matter of Brookfield*, 176 N. Y. 146); the owner loses all right and interest in the property, and his adjacent property, which was considerable, was largely depreciated in value by severance from the property taken and a Court that had jurisdiction to review the facts and set aside the report decided that the value of the property was more than nominal and directed a new appraisal, as it had discretionary power to do.

The owner was entitled to payment of the value of the property in money without deduction for any supposed benefits.

Matter of City of N. Y., 190 N. Y. 350.

Benefits are otherwise provided for by assessments in a separate proceedings on all property deemed benefited. (P. 3).

The order of the Appellate Division directing a new appraisal vacated the prior appraisal. The decision of the lower Court was reversed by the Appellate Division and the Court of Appeals had no jurisdiction to review the reversal on the facts.

Matter of Westerfield, 163 N. Y. 211.

The conclusion of the Commissioners that "the just compensation to be made to the owner and persons interested in the lands" is six cents is not supported by any finding of fact or statement that the lands are only worth that sum or why the owners and persons interested were not entitled to the full value of the land. Their finding of value was not approved by the Appellate Division, which had power to determine the facts and the case comes here without a finding that the value was merely nominal, as the Court of Appeals did not have jurisdiction to review that question and decide what the value was.

LXIII.

The City's authorities and arguments on questions of title are irrelevant here.

The title to the property was not on trial before the Commissioners or in this proceeding. If there was a dispute or doubt about the title, the Commissioners should have fixed the value of the property and made an award to unknown owners. The questions as to title involved must be tried out in an appropriate proceeding brought for that purpose.

Point XVI.

Matter of Com'rs of P. W., 135 N. Y. App. Div. 568.

LXIV.

The judgment of the Court of Appeals was not due process.

The judgment of the Court of Appeals, affirming the order of the Special Term, deprived the plaintiff in error of property without due compensation and therefore without due process of law, overruling the objections and exceptions taken to the invalidity of the proceedings because they were contrary to and in violation of the Constitution of the United States, and the parties or officers proceeding to make the appropriation did not keep within the authority conferred or observe the regulations made for the protection of the property owner, as they were bound to do, (2 Story Const. Sec. 1956) but without jurisdiction affirmed the order confirming the commissioners' report through which the owner was deprived of his property. That was not due process of law.

The judgment was contrary to and repugnant to Sec. 1 of the 14th Amendment of the United States Constitution and should be reversed.

(Assignment of Errors, specif. 1st, page 136; specif. 20th, page 152.)

In *C. B. & Q. Ry. v. Chicago* (166 U. S. 235), Mr. Justice Harlan said: "If *compensation* for private property taken

for public use is an essential element of due process of law as ordained by the Fourteenth Amendment, then *the Final Judgment* of a State Court, under the authority of which the property is in fact taken is to be deemed the act of the State within the meaning of that amendment."

LXVI.

The Constitution makes the Federal Constitution, treaties and laws supreme and the Federal Courts are never bound to administer local law where it conflicts with the Federal Constitution. All state laws and decisions conflicting with the laws of the nation must be disregarded. They are not rules for decision where the Constitution, treaties or statutes of the United States otherwise provide.

1 Rose Code Fed. Pro. Sec. 12, note f.

LXVII.

The decision of the Court of Appeals in this case is repugnant to the 14th Amendment to the Constitution of the United States, and its judgment should be reversed; the certificate of questions for review dismissed; the order of the Appellate Division reversing the order of the Special Term confirming the report of the appraisal commissioners and directing a re-hearing before other commissioners to be appointed by the Special Term should be affirmed, with a direction to proceed thereon, and costs in this Court and in the Court of Appeals should be awarded to the plaintiff in error, or the whole proceeding should be dismissed on the ground stated in the third question and because the interests to be taken and the rights and property have not been sufficiently defined to be the subject of appraisal. In case of dismissal of the proceeding, costs in all courts should be awarded to the plaintiff in error.

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SUPREME COURT OF THE UNITED STATES

CHARLES E. APPLEBY, as Surviving Trustee of the
Ogden Land Company,
Plaintiff in Error,
against
CITY OF BUFFALO,
Defendant in Error.

REPLY TO BRIEF FOR DEFENDANT IN ERROR.

The word "Brief" as used herein refers to the original brief for the plaintiff in error, and the brief for the defendant in error is called "City's brief."

REPLY TO POINT I.

1. The brief for the defendant in error, the City of Buffalo, repeats some of the errors of fact and of law, which led to a judgment appropriating property worth more than a quarter of a million of dollars for six cents.

The facts are correctly stated in the brief for the plaintiff in error, pages 18 to 37, with references to the record, and the questions of law are stated and sustained by authorities referred to in the points, beginning at page 43 of the brief.

2. The statement in Point I of the City's brief on page 5 that "The plaintiff in error and his co-tenants conveyed all of the lands within the City of Buffalo, on either side of the river, and retained, at most, the naked fee to the bed, subject to the right of the public to travel thereover" is incorrect.

Brief for Plaintiff in Error, pages 30 to 35.

The statement is based on certain unauthenticated maps which were incorrect and incompetent as evidence, which were duly objected to, but were erroneously received by the commissioners. (Pages 26-30) They prejudiced the

land owner before the commissioners, the Special Term and the Court of Appeals, and the statement based on them is made in the brief for the City to prejudice the plaintiff in error in this Court.

The statement was shown to be incorrect by the original map and field notes of the survey, made for the Ogden Land Company, and the testimony of Marsden Davy.

Pages 30-33 of Brief for Plaintiff in Error.

It should also be remembered that the proceeding was instituted to take the land "in fee simple" (Brief, page 18) "which is the greatest interest that can be granted in real estate. It includes title, the right of possession and the right to use for any purpose which may be lawful."

Matter of Brookfield, 176 N. Y. 146.

3. There was no interest specified other than the fee simple, and no other was so defined as to be the subject of appraisal.

96 N. Y. 361; 187 N. Y. 305.

"If the proceeding was instituted on the assumption and basis that the defendant has certain property rights to be condemned, the petitioner, having taken advantage of this assumption as a basis for this proceeding, would not be allowed therein to contest such rights."

City of Geneva v. Henson, 195 N. Y. 455, and other cases cited in Point XVI of Brief.

It is to be borne in mind in construing the statute, that, where there is a dispute in respect to the ownership of a parcel of land, it is the duty of the commissioners only to ascertain and report its value, and to make an award to unknown owners. (Citing Matter of Commissioners of Public Works, 135 App. Div. 561, 568).

Where the commissioners took proof of the title, the Court refused to allow them fees for doing so, holding that they had no authority to take such proof.

Matter of City of N. Y. (Olivet Ave.) 70 Misc. 277, Jan. 1911.

535 Ad. Sheets, April 1, 1911.

4. The commissioners erred in overruling the objections to the receipt of evidence to establish grounds for an award of less than the value of the property taken.

Pages 26-29 of Brief for Plaintiff in Error.

The counsel for the City states again and again that all of the land on either side of the river had been sold by the plaintiff in error. Pages 9, 12, 14. *The competent evidence was to the contrary, and the maps relied on for that state-*

ment were incompetent as evidence against the trustee of the Ogden Land Company (Point XVIII, Page 86); the title could not be disputed and the map, Exhibit 6, page 119, of the Record, shows that the river had changed its bed and that a large amount of land originally under water was at the time of these proceedings dry land.

5. If it had been true that the owner's land was all under water, the Constitution protects it as fully as if it had all been above water. He had substantial rights of which he could not be deprived without compensation.

Point LVII, pages 171-187, of Brief for Plaintiff in Error, and Point LVIII, page 187.

In the case of the Fulton L. H. & P. Co. v. State of New York, 200 N. Y. 400, (No. 531, Advance Sheets, March 11, 1911,) the opinion in which was published after the brief in this case was printed, the Court held that land under the water of Oswego River could not be taken without compensation to the owner, and affirmed an award by the Court of Claims for a large amount. The same thing has been decided by this and other Courts and many times by Courts of the State of New York.

Page 90 of Brief.

On page 18 of City's brief is a statement of the theory on which the commissioners fixed the compensation awarded at six cents. They did not fix the value of the land in fee simple at that sum. The theory is erroneous. The fee simple was taken and the owner was deprived of valuable rights.

Point LVII, page 176, *et seq.* of Brief.

6. On page 10 of his Brief, the counsel for the City states that "*there was no question of fact in the case and the Court of Appeals had jurisdiction and authority to answer the questions certified to it.*" We agree that it was conclusively proved that the land was valuable and owned by the plaintiff in error.

Those facts sustain the reversal by the Appellate Division and were not grounds for reversal by the Court of Appeals.

We do not agree that the property taken was burdened with the right of travel, or any other encumbrance, or that by any act of the Legislature it became a public highway (Brief, page 151) and we claim that the City cannot contest in this proceeding the rights of the plaintiff in error as owner in fee simple.

Brief, page 82.

The case cited to sustain the proposition presented by the City's counsel that decision upon the facts by the Appellate Division may be reviewed by the Court of Appeals (180 N. Y. 107) was overruled in 181 N. Y. 278, 283, and *Brennan v. City of N. Y.*, 123 N. Y. App. Div. 7-11. Both cases were commented on in an opinion by Mr. Justice Gaynor, 123 N. Y. A. D. 7, 10. A quotation from that opinion appears on page 133 of our brief.

In *Allen v. Corn Exchange Bk.* (181 N. Y. 278, 283) the Court of Appeals say that the case of *Reich v. Dyer* (180 N. Y. 107), cited on p. 10, City's brief, was inadvertently decided and "that case is not a precedent to be hereafter followed."

In the *Matter of Westerfield*, 163 N. Y. 209, it was held that a question similar to the first two certified in this case could not be answered because different conclusions might be drawn from the evidence.

Points XXVII, XXVIII, XXIX, pages 104-110.

That the questions were not such as the Court of Appeals had power to answer has been decided many times.

Point V, page 52; Point VI, page 54; Point XX, page 91; Point XXI, page 95, and Points XXII, XXIII, XXIV, *et seq.* to page 110.

8. The cases hold that questions of fact cannot be made questions of law by certifying them as such.

Point XXI, page 93 of our Brief.

Permission to appeal and "certification" does not dispense with the jurisdictional requirement for a stipulation for judgment absolute.

Mundt v. Glokner, 160 N. Y. 571.

Even the Legislature cannot dispense with this condition.

160 N. Y. 671.

In *Caponigri v. Altieri* (164 N. Y. 476, 480) the Court said: "The permission to appeal, under Subd. 2 of Sec. 191 of the Code of Civil Procedure, *in no way enlarged the jurisdiction* of this Court with respect to the questions that may be reviewed by it, upon a hearing of the appeal." Citing—

Commercial Bank v. Sherwood, 162 N. Y. 310, 317.

Reed v. McCord, 160 N. Y. 330.

Young v. Fox, 155 N. Y. 615.

Grannan v. Westchester Assoc., 153 N. Y. 449.

Mundt v. Glokner, 160 N. Y. 571.

See Point XXI, page 93.

The City errs when it claims (p. 9) that all of the facts are "of record and uncontroverted."

Controverted questions of fact, not of record, were involved in the case, viz:

1. The *value* of the property was a question of fact but was conclusively proved to be more than nominal and was so found by the Appellate Division which had power to finally determine the facts. Their decision was final.

2. The *extent* of the property covered by the description "Lands under the waters."

3. The *title* to the "Lands under the waters."

4. The ownership or title to land adjacent to lands under water.

5. The navigability in fact of the stream.

6. Whether that *portion* of the stream had been made "A public highway by law."

7. Whether the City was taking the fee or a less interest the land to be taken and the interest therein should have been described and defined by the applicant for condemnation and not left for the commissioners to ascertain and determine.

Matter of Water Comr's, 96 N. Y. 361.

The commissioners had no power to decide any question except value (and that was subject to review). The owner was entitled to a trial before the Court on the questions of title or ownership of the land; the ownership of adjacent lands; the navigability or non-navigability in fact; whether it was or was not a public highway; the location of the "lands under the waters" and what that description meant.

8. Before reaching any question of law in the first and second questions it is necessary to decide mixed questions of law and fact not certified.

Certificates of such questions should be dismissed.

Point VI, page 54 of Brief.

9. The claim made on pages 10 and 11 of the points for the City that the reversal by the Appellate Division must be deemed to have been made on questions of law only is incorrect. The general rule is that where the order is silent as to the grounds of reversal, the presumption is that the Appellate Division based the decision upon the facts as well as the law.

Points X, XI and XII, pages 59-74 and Point XXXVI, page 127 of Brief for Plaintiff in Error.

There is only one exception to the general rule and this case is not one to which the exception applies. The one exception is created by Sec. 1338 of the Code, which relates to a reversal of a judgment entered upon the report of a referee or decision of a judge before whom issues in an action have been tried without a jury, or an order granting a new trial on such a reversal where the appellant stipulates for judgment absolute in case of affirmance. In those cases the Referee or Judge must make written findings of fact and conclusions of law and direct the judgment to be entered, and the clerk enters the judgment on the report or written decision.

In those cases the Appellate Division examines the evidence to see if it sustains the findings of fact. If it does not, the Court reverses because the findings are not sustained by the evidence and the reversal is said to be on the facts and the Court so certifies in the order of reversal. If the reversal is not because the evidence fails to sustain the findings, they stand approved and the question whether the findings of fact sustain the conclusions of law remains to be considered.

The findings of fact must be sufficient to sustain the conclusions of law or the judgment will be reversed.

Dougherty v. Lion Fire Ins. Co., 183 N. Y. 302.

In such cases the findings of fact stand as approved unless the Appellate Division states in the order of reversal that the reversal is on the facts, but the facts found in the written decision must be sufficient to sustain the decision and judgment or the reversal will be authorized as matter of law, (Points for Plaintiff in Error, pages 72 and 73) and the reversal will not be reversed on a presumption that the reversal was on questions of law only. In case the findings are insufficient to sustain the judgment the reversal is a reversal on questions of law. If the findings are not supported by the evidence and the Court reverses on that ground, the reversal is on the facts, but if the reversal is because the findings are insufficient the reversal is on questions of law.

Neither the commissioners nor the Special Term made any findings of fact. The commissioners adopted the erroneous theory of the City Attorney that the owner of land under the waters of Buffalo River was entitled to no more than nominal damages.

City's Brief, pages 19-20.

The report does not state what they find the value of the land is but that "they ascertain and report the just com-

compensation to be made to the owners and persons interested in the said lands as follows, etc."

Record, page 25.

That was their conclusion of law on the theory that for the land under water only nominal damages could be awarded.

It is only where issues have been tried before a Referee or Judge without a jury that there are decisions making findings of fact.

Code, Sec. 1022.

McNulty v. Offerman, 141 App. Div. 730, 734; No. 536 Advance Sheets, April 8, 1911.

Sec. 1338 of the Code applies to those cases and no other. It does not apply to judgments entered on the verdict of a jury or an order made on the decision of a motion or an order in eminent domain proceedings.

Brief for Plaintiff in Error, pages 66-74 and cases cited on pages 65 and 66.

In a case reported in 4 Keyes (43 N. Y.) 279, 286, the Court of Appeals decided that where a judgment entered on a verdict of a jury was reversed and the order of reversal did not state that the reversal was on the facts, that it must be presumed that the reversal was not on questions of fact. That case was expressly overruled in Wright v. Hunter, 46 N. Y. 411; Sands v. Crook, 46 N. Y. 564, and other cases.

In Dickson v. B'dway etc. R. Co., 47 N. Y. 511, it was said that in the case in 4 Keyes (*supra*) the learned judges inadvertently failed to distinguish between appeals from orders granting new trials in actions tried by a jury and in those tried by the Court or a Referee.

In Sands v. Crook, 46 N. Y. 568, the Court said that the rule that a judgment shall not be deemed to be reversed on questions of fact, unless so stated in the order of reversal, applies only to cases tried before the Court or a Referee.

In Henavie v. N. Y. C. etc. Co. (154 N. Y. 278, 282) the Court said: "If it was the intention of the Legislature to place all appeals upon the same footing, so far as the section relating to presumptions is concerned, there was no necessity of specifying the different kinds of judgments by referring to what they were entered upon. If all were to be included, both clearness and brevity would have been promoted by saying so and omitting the enumeration as superfluous. That Sec. 1338 applies only to the reversal of a judgment in an action entered upon the report of a

Referee or the decision of a Court upon a trial without a jury is settled.

Brief for Plaintiff in Error, Point XII, page 64
et seq.

The learned Judge who wrote for the Court of Appeals from whose opinion the quotation on page 13 of the City's brief is taken, inadvertently cited Sec. 1361 of the Code without noticing that it does not apply to appeals to the Court of Appeals, (128 N. Y. 98) and the Chapman case, without noticing that it does not refer to Sec. 1338, or the question of presumptions, and the Manhattan case, without noticing that issues were joined and referred for trial to a Referee, who was directed to report his findings of fact and conclusions of law. There were no questions certified for review and the appeal was a general appeal from a final order. The jurisdiction of the Court to entertain the appeal was not questioned. The Court failed to notice that Sec. 1361 by its terms is confined to appeals taken as prescribed by Title 5, which are appeals to the Appellate Division (page 68 of our Brief) and that the Court of Appeals had decided that the section does not apply to appeals to the Court of Appeals (*Matter of S. B. R. R. Co.*, 128 N. Y. 94, 98) and that it was not authority for applying Sec. 1338 to appeals to the Court of Appeals in special proceedings and did not refer to the large number of cases cited in Point XII of our Brief, with which, as construed in this case, it is in conflict. Besides, in that case there were issues tried and findings of fact by a judge, so that it is not authority in respect to a case where there was no trial of issues before a Referee or Judge, but a mere assessment of damages before commissioners, which was not a trial; (Page 69 of Brief for Plaintiff in Error) or that it was not applicable to a case which was not a general appeal, and the review was confined to the special question certified for review.

Code C. P. Sec. 190.

10. The statement on page 10 of the City's brief "that there was no question of fact in the case" appears to agree with what was said in the opinion of the Appellate Division in respect to the ownership and value of the property. The opinion on page 122 of the Record says: "We think the citation of authorities unnecessary to demonstrate that the appellant was the owner of valuable property, which consisted of the bed of the Buffalo River, which the City of Buffalo by this proceeding has attempted

to acquire. * * The evidence shows conclusively that such property is valuable * * that it is more than nominal is conclusively established."

Upon those facts the question "1. Is Charles E. Appleby, as surviving trustee of the Ogden Land Co., under the facts in this proceeding, entitled to an award of more than six cents damages on the City of Buffalo acquiring the fee to the lands under the waters of the Buffalo River in eminent domain proceedings, etc.," should have been answered in the affirmative and it was error to answer otherwise.

Unfortunately, the Court of Appeals misconstrued the questions and did not agree with the counsel for either party as to their meaning,

Brief for Defendant in Error, page 13, and our brief, pages 125-6, Point XXXV.

or that there was no question of fact, but said that "their evidence presented a well defined question of fact."

Page 128 of the Record.

There were no undisputed facts in the case on which the City was entitled to acquire the land in fee simple for six cents as matter of law. If the ownership and value are not disputed the award should have exceeded a quarter of a million of dollars, as there was evidence warranting the finding that the value exceeded that sum and that the plaintiff in error was the owner.

We think that the Court of Appeals erred.

If there was no question of fact the question should have been answered in the affirmative on the ground that the property was proved to be valuable and the ownership was conceded and could not be disputed. If there was a question of fact, the Court of Appeals had no jurisdiction to decide it as the Court and the City's counsel concede, and the appeal should have been dismissed as it was in "The Matter of Westerfield," 163 N. Y. 209, 213, cited on page 104, and other cases referred to on pages 104 and 105 of our Brief.

11. The last paragraph on page 9 of the City's brief is incorrect, so far as it states that all of the land on either side was plotted and laid out into lots bounded by the bank of the river; that all of the land on either side of the river, prior to the commencement of this proceeding had been sold by the plaintiff in error and his co-tenants, and that the only interest which the plaintiff in error had was to the bed of the river, or that his rights were burdened

with rights of the public, or others. The proofs are to the contrary and the City was precluded from denying that the plaintiff in error was the owner in fee simple.

Points XVI and XLIV of Brief for Plaintiff in Error.

12. The questions "upon the facts in this proceeding" to be questions of law must be deemed to be all the facts the Appellate Division was warranted by the evidence in finding in favor of the party prevailing in *that Court*.

In *Otten v. Manhattan R. Co.* (150 N. Y. 401), cited in the City's brief, page 8, it was said: "When the Appellate Division reverses upon the facts * * * a question of law arises as to whether there was any evidence to support the views of *THAT Court*. If it appears that there was any material and controverted question of fact, *the decision thereof by the Appellate Division is FINAL.*"

Also cases cited in Points XII and XXXVII of our Brief.

13. The Appellate Division should have certified in the questions the facts as determined by them (page 130 of Brief) and should not have left the Court of Appeals to decide on all of the evidence what the facts were and to grope for the questions of law lurking in all of the evidence and proceedings in the case.

United States Supreme Court, Rule 37.

Cross v. Evans, 167 U. S. 60.

The questions are "upon the facts" not evidence, (Page 134 *et seq.* of Brief) and to be answerable required a statement of the facts as determined by the Appellate Division. It was the province of the Appellate Division to decide the questions of fact. The Court of Appeals did not have power to deal with them.

Tousey v. Hastings, 194 N. Y. 79, 82.

The Court of Appeals in searching the record for the question of law intended to be certified, as appears by the City's brief, failed to find it.

The City's brief shows that the question intended to ask whether the City of Buffalo could as matter of law acquire title to the lands under the water of Buffalo River for six cents, irrespective of the value of the land in fee simple.

The City was precluded from alleging that the plaintiff in error was the owner of a less estate than the fee simple, which the proceeding was instituted to acquire, (Brief, page 82) and the award should have been for the full value of the land in fee simple and riparian rights, (Brief, page

83) without deductions for disputed adverse claims or for supposed benefits which the commissioners do not assess.

Matter of City of N. Y., 190 N. Y. 350.

It is not claimed by City's counsel that the award was made on such a basis.

If there were benefits for which the owner was chargeable they were to be assessed by the City assessors on all property benefited. If benefits could be deducted by the commissioners and again assessed by the City assessors, the owner would be charged twice.

In Matter of Com'r of Pub. Works (135 App. Div. (N. Y.) 562) it was held: "Where the title to the lands taken is in dispute the award should be made to unknown owners, although the dispute is between the *city* and a private person."

14. The proceeding takes the property in fee simple; the City becomes absolute owner with power to sell or dispose of it as it sees fit. In no contingency does it revert to the owner from whom it is taken, and the amount to which the owner is entitled is not affected by the purpose for which it is said to be taken.

Point XXXI, Page 116 of Brief for Plff. in Error.

By an act passed in 1901, Ch. 199 of Laws of N. Y., amending Sec. 445 of the City Charter, the City is authorized to exchange the lands for other lands. For a copy of the act we refer to page 116 of our Brief.

A plan has been adopted to change the channel 500 feet from the present channel.

City of Buffalo v. Delaware, etc., 126 A. D. 127.

15. The statement on page 16 of the City's brief that the general Condemnation Law does not apply to these proceedings is incorrect.

Code C. P. Sec. 3382, City Charter Sec. 423 on page 33 of the City's Brief, and Point LIII of our Brief.

The law does apply to all proceedings not provided for by the Charter, and the proceedings on appeal are wholly regulated by it and other provisions of the Code.

Secs. 3358, 3359, 3360, 3382 and Sec. 423 of City Charter.

The defendant in error made his application for an order certifying questions for review under subdivision 2 of Sec. 190 of the Code.

Appeals to the Appellate Division in Eminent Domain proceedings are of frequent occurrence.

The right to so appeal is well settled.

Brief, Point XXIII, page 95.

16. The statement that the commissioners viewed the premises is subject to the statement in the case that it contains all the evidence, (Record, page 107) and must be so regarded. Brief, page 148.

Jefferson etc. v. Brown, 40 Ind. 545.

Laffin v. Ch. W. & N. R. Co., 33 Fed. R. 540.

Matter of City of N. Y., 66 Misc. 488.

Matter of City of N. Y., 67 Misc. 194-5.

The report cannot be sustained by things seen which were not reported, if there were any.

The Appellate Division is empowered to review the proceedings of the commissioners on their report and the accompanying evidence and to grant a new appraisal in its discretion, and is not prevented from granting a new appraisal upon a presumption that there was anything seen which differed from the evidence reported.

Brief, pages 148-9.

The review is necessarily confined to the evidence reported and it cannot be assumed that anything different was seen by the commissioners.

REPLY TO POINT II.

1. It is obvious that the evidence introduced and received to show that the title to the land was not *the fee simple*, which includes the entirety (Brief for Plaintiff in Error, page 84) was so encumbered as to leave what the counsel calls only a "naked fee," for which the owner was not entitled to the value of the land, involved a trial of the title.

DeCamp v. Dix, 159 N. Y. 436.

Forster v. Scott, 136 N. Y. 577, 584.

The commissioners were not competent to try or decide those questions.

Points XVI and XVII of our Brief, page 80 *et seq.*

Whether there were easements or not could not be tried before the commissioners.

Matter City of Yonkers, 117 N. Y. 572.

2. The provisions of the City charter cited to establish the claim that the property in question has been made a public highway by law, do not support the claim. The state did not own the property and did not provide for any process of law to take it, or for compensation to the

owner, and the provisions in the Charter did not affect the title or rights of the owner.

Forster v. Scott, 136 N. Y. 577, 584.

Brief for Pltff. in Error, page 150 *et seq.*

3. The N. Y. City street cases cited on page 20 of City's brief were under a special statute and are distinguished in City of Buffalo v. Pratt, 131 N. Y. 296-7.

The rights of the owner of land in a stream are not so limited as those of an owner of land in a public street.

Brief, pages 172-3.

4. The statement on page 18 "that the plaintiff in error had parted with title to all of the lands adjoining the river on either side, and that the river was, and had been for years a navigable stream is not in accordance with the facts.

Brief for Plaintiff in Error, pages 30 to 35.

5. The river was a non-boundary, non-tidal, fresh water stream and was not navigable in law.

Fulton L. H. & P. Co. v. State of N. Y. 200 N. Y. 400; No. 531, Advance Sheets, published March 4, 1911. Page 89 of our brief quotes from it.

Volume 200 of N. Y. Reports is still in the hands of the printer but the opinion has been published in the Advance sheets.

The river was not naturally navigable in fact. It was originally called a Creek. Its mouth before it was dredged and widened was so small that it could be stepped across and no boat larger than a canoe or French batteau had ever entered it.

Brief for Plaintiff in Error, pages 153-160.

The United States has no right in or to the river and has expended no money on it and has refused to assume jurisdiction over it.

Page 156 of our Brief.

City of Buffalo v. D. L. & W. R. Co., 126 A. D. 129, 130.

The case of the Fulton L. H. & P. Co. v. State of New York (200 N. Y. 400) involved the question raised in this case, as to what compensation an owner of land under the water of a fresh water river, navigable in fact, was entitled to. The Attorney General for the State contended that the compensation should only be nominal. The Court of Claims, which had jurisdiction to hear and determine such questions, decided that the compensation should be substantial and awarded a large sum—over \$200,000 and the

Court of Appeals affirmed it. The case related to Oswego River, which runs to Lake Ontario.

As in *Fulton L. H. & P. Co. v. State* (200 N. Y. 400, 418) the City of Buffalo proposes to *exchange* part of the lands taken in fee and divert the river and make new channels

City of Buffalo v. D. L. & W. R. R., 126 N. Y. 127.
Chap. 199, Laws 1901.

The City is not the State, nor is it the public, nor is it "the trustee of a special public servitude". The City is taking the *land* in fee (a proprietary title) and not *in trust* solely for a highway or for the purposes of improving navigation. It may abandon the public use tomorrow and sell or exchange the land taken, as provided in the City Charter, Sec. 445 and Chap. 199, N. Y. Laws of 1901, copied in Brief, page 116.

6. The Brief for the Defendant in Error indicates that the question of law intended to be submitted to the Court of Appeals was whether the owner of land under the water of Buffalo River was entitled to more than nominal damages when the fee was taken in eminent domain proceedings.

The case last above cited decides that question against him. It is not the first time that the Courts have decided that the owner is entitled to substantial damages.

Brief, page 90.

7. On page 19 of his Brief, the counsel for the Defendant in Error says "the river within the limits of the City of Buffalo is practically an arm of Lake Erie and under the control of the Secretary of War."

It appears in the case of *City of Buffalo v. D. L. & W. R. Co.* (126 App. Div. 129, 130), that the Secretary of War refused to assume jurisdiction over the river.

The Oswego River terminates in Lake Ontario, but in the case relating to it above cited, the Court held that the common law applied to non-boundary, fresh water streams in the State of New York and that they are not navigable in law, and that the owner of the land cannot be deprived of the water or land without compensation.

Brief, page 89.

The common law rule is that only tidal and salt waters are navigable in law.

Fulton etc. Co. v. State, 200 N. Y. 412.

Under the common law rule, Buffalo R., even if navigable in fact, as a fresh water stream, is non-navigable in law and a private stream.

Fulton L. & H. P. Co. v. State, 200 N. Y. 415.

The rights of the owner are valuable and cannot be taken by right of eminent domain without compensation—"a full and fair equivalent".

Brief, pages 171-187.

III.

The Brief of the Defendant in Error does not meet the objection that the Court of Appeals did not have jurisdiction to render final judgment disposing of the whole case, on certified questions of law, to which the statute restricted its authority. The judgment so rendered was not due process of law.

Brief for Plaintiff in Error, Point XXX, page 98; Also pages 51, 56, 57, 58, 59, 97, 98 *et seq.* 108, 112, 115, 117, *et seq.*

For *due process of law*, the officers proceeding to make the appropriation *must keep within the authority conferred*.

2 Story Const. 1955.

C. B. & Q. R. R. v. Chicago, 166 U. S. 233.

Stuart v. Palmer, 74 N. Y. 183.

REPLY TO POINT III OF BRIEF FOR DEFENDANT IN ERROR.

1.

Sec. 1 of the 14th Amendment to the Constitution of the United States, which forbids any state to deprive any person of property without due process of law, was involved.

The decision of the highest Court of the State against the Plaintiff in Error was repugnant to that provision.

The decision necessarily included a decision of the question of repugnancy adverse to the owner by whom it was set up.

C. B. & Q. R. R. Co. v. Chicago, 166 U. S. 281-2.

Brief for Plaintiff in Error, Points I & II, page 43, *et seq.*

The case is one that may be reviewed on Writ of Error. Nielson v. Lagow, 12 How. 98.

C. B. & Q. R. Co. v. Chicago, 166 U. S. 232.

Water Power v. Street Ry. Co., 172 U. S. 488.

Bridge Propr. v. Hoboken Co., 1 Wall. 116.

2

The ruling of the commissioners and receipt of evidence to establish grounds for an award of less than the value of the land taken, and the receipt of incompetent evidence including unauthenticated and incorrect maps to affect the title and diminish the award, related to the compensation to which the owner was entitled, which was a Federal question. Erroneous rulings on those questions are reviewable on Writ of Error.

3

There was no tenable ground upon which the case could have been decided against the Plaintiff in Error, without overruling his exceptions to the report on the ground of its repugnancy to the Constitution of the United States.

4.

The report of the Commissioners was without force or effect in itself as an adjudication on the question of value. The Appellate Division had original jurisdiction to review and refuse to confirm it, and to grant a new hearing before other Commissioners.

Page 96 of Brief for Plaintiff in Error.
Code C. P. Sec. 3377.

Upon the refusal of the Appellate Division to confirm the report and the order directing a re-hearing before new commissioners, the case stood without any adjudication fixing the value. That Court was the highest Court with jurisdiction to determine questions of fact, and decided that the value was more than nominal. (Record, 122). The Court of Appeals could not and did not decide what the value was. It said that upon the evidence it could not say as matter of law what the value was.

The result is that the Plaintiff in Error has been deprived of his property without a decision determining the value of the property and without a review upon the evidence by the Appellate Division to which he was entitled.

Harris v. Burdett, 73 N. Y. 138.

The reversal of the decision of the Appellate Division and rendition of final judgment, deprived him of the result of a hearing on the facts and the question of the weight of evidence, so that he had a judgment against him

without a review upon the question of the weight of evidence at all.

Caponigri v. Altieri, 164 N. Y. 479.

Brennan v. City of N. Y., 123 App. Div. 9 (N. Y.)

"It would not be (was not) fair to order a final judgment against the property owner without a decision upon the facts."

Spies v. Lockwood, 165 N. Y. 483-4.

An appeal to the Court of Appeals where the judgment may have been on the facts cannot be taken because it might result in depriving the party of the review by the Appellate Division.

Cases above cited.

5.

The report of the Commissioners was excepted to on the ground that the report was contrary to the Constitution of the United States; that the owner of the fee of the land was entitled to substantial damages and the sum reported is only nominal and much less than the damages sustained by the owner and that the sum awarded is less than just compensation.

Record, page 17.

One of the questions certified was "4. Did any of the exceptions call for a reversal of the appraisal commissioners' report?"

The Court of Appeals answered that question in the negative, thus deciding the Federal question against the Plaintiff in Error.

Record, page 132.

The Court of Appeals could not have decided the cause against the Plaintiff in Error, without deciding the Federal question against him. The record shows that it did so decide it.

6.

The reversal by the Court of Appeals and the final judgment rendered were not due process of law because the whole case was not brought up, as it would be on a general appeal. There was only a reference of the certified questions for decision. The judgment rendered deprived the Plaintiff in Error of a hearing on questions upon which he had a right to be heard and particularly de-

prived him of the review by the Appellate Division of the facts to which the law entitles him.

Henavie v. N. Y. C. etc., 154 N. Y. 280 & cases therein cited.

Caponigri v. Altieri, 164 N. Y. 479.

Brennan v. City of N. Y., 123 App. Div. 9.

Spies v. Lockwood, 165 N. Y. 483-4.

Brief for Plaintiff in Error, pages 50, 57, 118-120.

7.

The cases cited in the third point of the Brief for the City do not sustain the propositions for which they are cited.

Under the rulings in the C. B. & Q. case (166 U. S. 231-2) the right to a review on Writ of Error is clear.

The case comes here with an actual finding by the highest Court having power to deal with the facts that the value of the property was more than nominal (Record, page 122) and a presumed finding that it was worth more than a quarter of a million of dollars.

Points XI and XII, pages 39-59 of Brief.

The owner's property was taken without compensation. The objection to it as repugnant to the Constitution of the United States was taken at the proper time (Record, 17 and 31) and decided adversely to the owner by the highest Court of the State. There was no tenable ground independent of the Federal question upon which the judgment could be sustained; the departures from the requirements of the statute were jurisdictional; there has been no adjudication by the state Court that the value of the land and the appurtenant riparian rights were no more than nominal—the Commissioners did not decide that, but held as a proposition of law on an erroneous theory, urged here by the City's Counsel, that the owner of land under water of a natural stream was only entitled to a nominal sum (City's Brief, page 18); their report was without effect without approval, and the Appellate Division by its refusal to approve and by directing a re-hearing prevented it from going into effect; the decision by the Appellate Division on the facts in favor of the owner was final (150 N. Y. 401); the Court of Appeals had no power to decide or determine questions of fact and so said in their opinion; the case comes here as it did before the Court of Appeals.

with a presumed and actual finding by the Appellate Division that the Plaintiff in Error was the owner of the land appropriated in fee simple and that the value of it was more than nominal; the Court of Appeals was concluded by that finding and could not and did not decide to the contrary, (the ruling that the evidence was conflicting and that it could not be said as matter of law that the value of the property was more than nominal was not a decision that the evidence was insufficient to authorize the Appellate Division to find that the value was more than nominal). The owner was entitled to a decision upon the facts if the evidence was not conclusive. Upon the evidence and facts conclusively proved and found by the Appellate Division, it appeared that the Plaintiff in Error was the owner of the property and that it was worth more than six cents. As matter of law, the question should have been answered in the affirmative—that the Trustee of the Ogden Land Company was entitled to an award of more than six cents damages. A clear case of repugnance to the Constitution of the United States was established and decided adversely to the Plaintiff in Error and should be reviewed and reversed by this Court.

Were it true that the judicial authorities of the State kept within the letter of the Statute (the departures were wide and jurisdictional), their final action was inconsistent with the 14th Amendment.

“The mere form of the proceeding instituted against the owner, even if he be admitted to defend, cannot convert the process used into due process of law, if the necessary result be to deprive him of his property without compensation.”

Opinion by Mr. Justice Harlan in *C. B. & Q. R. Co. v. Chicago*, 166 U. S. 236.

The United States Supreme Court may examine and decide for themselves whether the Constitution has been violated.

Bridge Propr. v. Hoboken Co., 1 Wall. 116.

C. B. & Q. Ry. v. Chicago, 166 U. S. 231, 233, 259.

The Court of Appeals did not decide that the Plaintiff in Error was not the owner, but said: “In reaching this conclusion, we have assumed, as did the City in the institution of the proceeding, that the respondent was vested with the fee of the river bed.”

Record, page 127.

In commencing the proceeding, the Common Council declared that it intended to take the land in fee simple and excepted nothing.

Record, page 5.

The award should have been made for what the City intended to take and not what the Corporation Counsel calls a "naked fee" so encumbered as to be without value.

This is a proper case for a review and reversal on Writ of Error. It is a suit; the final order is in effect a judgment and the proceeding deprives the owner of property conclusively proved to be of great value without compensation.

POINT IV.

In *Westerfield v. Rogers* (174 N. Y. 246), it was said: "It has been held again and again that it (the Court of Appeals) has not the power to review an exercise of discretion committed to the Supreme Court after its exercise by that Court. Indeed, it has never been held otherwise."

"The claim is made that the plaintiffs, the sisters of Thomas, had practically excluded him from having any care or control over the trust estate. *This was a controverted question of fact*, in which, under the Constitution of the State, the Appellate Division became the Court of last resort, and the duty devolved upon that Court of finally determining that question; and this Court (the Court of Appeals) has no power to review the same, unless in the case of a divided opinion, in which case this Court may determine as to whether there is any evidence to sustain the finding made" (by the Appellate Division).

Westerfield v. Rogers, 174 N. Y. 242-3.

"A discretionary order in an eminent domain proceeding setting aside a report of Commissioners, appointing new Commissioners and directing a new appraisal was reviewable by the Appellate Division but not by the Court of Appeals.

"The Court had power to revoke the appointment of the first Commissioners for good cause shown, and it also had the power to set aside the confirmation of their report for good cause shown and to reject it. When those things were done there were no commissioners and no appraisal and no report.

"It was exercising its inherent power over the proceedings of the Court to annul, vacate and set them aside."

Matter of Daly, 189 N. Y. 38-9.

O. O. COTTLE,
*Attorney and Counsel
for Plaintiff in Error.*

Edmund P. Cottle,
Counsel.

Supreme Court of the United States

OCTOBER TERM, 1910

No. 162

CHARLES E. APPLEBY, as sur-
viving Trustee of the Ogden
Land Company,

Plaintiff in Error,

Against

THE CITY OF BUFFALO.

This proceeding was commenced, pursuant to Chapter XX. of the Charter of the City of Buffalo, on the 7th day of January, 1901 (Record fol. 3). On May 23d notice was personally served on plaintiff in error that application would be made to the Supreme Court at Buffalo, New York, on June 3, 1901, for the appointment of Commissioners to ascertain the just compensation to be made to the owners, mortgagees or parties in interest for the lands to be taken (Record, fol. 10). On the return day of the motion the same was, by consent of all parties, held to June 5th, on which day the plaintiff in error appeared in person and, on

motion of the appellee, the Court appointed three commissioners to ascertain the just compensation to be made to the owners, mortgagees or persons interested for the lands to be taken as described in the notice, and at the same time the proceedings were amended by striking therefrom, as party defendants, certain railroad companies (Record, fols. 14-16).

On the 5th day of June, 1901, Mr. O. O. Cottle, an attorney and counselor of the courts of the State of New York, formally appeared in said proceedings for the plaintiff in error (Record, fol. 62) and thereafter represented his interests. The Commissioners took the constitutional oath of office on the 10th day of June, 1901 (Record, fol. 24), and, after viewing the premises to be taken and hearing the allegations and proofs of the parties, made their report on the 30th day of August, 1901 (Record, fols. 24-27).

The plaintiff in error, by his attorney, served exceptions to the report of the Commissioners (Record, fol. 27). The report of the Commissioners was duly confirmed by the Court on the 31st day of December, 1901 (Record, fols. 33-44). The plaintiff in error on the 25th day of January, 1902, moved the Court for an order setting aside the order confirming the report of the Commissioners (Record, fol. 49), and the same was, by an order duly made on the 10th day of February, 1902, set aside, and an order duly granted confirming said report of the Commissioners, which last order recited certain facts in connection with the transaction, which were requested by the plaintiff in

error (Record, fols. 57-61).

Appeals were taken by the plaintiff in error from the orders confirming the Commissioners' reports (Record, fol. 2-3). The order of the Supreme Court, confirming the report of the Commissioners, was reversed by the Appellate Division of the Supreme Court of the State of New York on the 13th day of November, 1906 (Record, fol. 217).

Thereafter and on the 5th day of March, 1907, the Appellate Division of the Supreme Court, by an order duly made, granted leave to the defendant City of Buffalo to appeal to the Court of Appeals and certified to the Court of Appeals of the State of New York four questions of law, which, in the opinion of said Appellate Division, ought to be reviewed by the Court of Appeals (Record, fol. 224).

The plaintiff in error made a motion to dismiss the appeal to the Court of Appeals and a motion to reargue the motion to dismiss, also, a motion to reargue the appeal on its merits and also a motion to send back to the Appellate Division to resettle certified questions, etc., all of which motions were denied by the Court of Appeals (Record, fol. 241).

Said appeal having been duly argued in the Court of Appeals and the questions certified by the Appellate Division having been answered by the Court of Appeals as follows: The first and fourth questions answered in the negative; second question certified answered in the affirmative and

the third question not answered, the order of the Appellate Division was reversed and all the papers and proceedings were remitted to the Appellate Division, Fourth Department, to be enforced according to law (Record, fols. 244-245).

Whereupon an order was duly made by the Appellate Division of the Supreme Court, Fourth Department, making the order of the Court of Appeals the order of that Court and reversing its order theretofore entered in the Erie County Clerk's office on the 9th day of January, 1907, and confirming the order of the Special Term of the Supreme Court, which confirmed the report of the Commissioners and which order of confirmation was entered in the Erie County Clerk's office on the 8th day of January, 1902 (Record, fols. 249-252). Thereafter a writ of error to the Supreme Court of the United States was allowed by Hon. Rufus W. Peckham, one of the Associate Justices of the Supreme Court of the United States.

POINT I.

THE STATE COURT HAD JURISDICTION
OF THE PERSON AND OF THE SUBJECT
MATTER INVOLVED IN THE PROCEED-
ING.

Buffalo River rises east of the City of Buffalo and flows in an irregular course westerly across the City of Buffalo, as appears by the map shown on page 118 of the record, and empties its waters into Lake Erie, the western boundary of the City of Buffalo. The slope of the land from the east-

ern bounds of the City to Lake Erie is very slight, and the water in the river is affected by the rise and fall of the lake (Record, page 78).

Charles Appleby and others, as trustees, at one time owned all of the lands on either side of the river from the easterly bounds of the City of Buffalo to Hamubrg Street in said city, having acquired their title from the State of Massachusetts and from the Seneca Nation of Indians (Record, page 119).

Prior to the commencement of the proceedings to acquire the fee to the bed of the river, the plaintiff in error and his co-tenants conveyed all of the lands within the City of Buffalo on either side of the river and retained, at most, the naked fee to the bed, subject to the right of the public to travel thereover.

The Charter of the City of Buffalo confers upon it the power to take lands by condemnation for public buildings, parks, public grounds, squares, street, canals, basins, slips and other public waters, and for any other corporate purpose, and prescribe the course of procedure to acquire the same. That portion of the Charter which is applicable to such proceedings is contained in title 20 of the Charter, and is shown in appendix "A" hereto annexed.

The Commissioners herein, after a full and fair hearing and after viewing the premises, made their report, which was duly confirmed by the Court (Record, page 34). The plaintiff in error

appealed to the Appellate Division of the Supreme Court of the State of New York, where the order of the Special Term confirming the report of the Commissioners was reversed (Record, page 129). An appeal to the Court of Appeals was allowed by the Appellate Division of the Supreme Court and the following questions certified for answer:

“1. Is Charles Appeby, as surviving trustee of the Ogden Land Company, under the facts in this proceeding, entitled to an award of more than six cents' damages on the City of Buffalo acquiring the fee to the lands under the waters of the Buffalo River in eminent domain proceedings, taken pursuant to its revised City Charter for the purpose of a public highway?”

“2. Were the appraisal Commissioners authorized and empower, under the facts in this proceeding, to fix the actual damages to Charles E. Appleby, as surviving trustee of the Ogden Land Company, on the City of Buffalo acquiring the fee to the lands under the waters of the Buffalo River, at six cents, and to award said sum as and for the just compensation to be made to the said Charles E. Appleby, as surviving trustee of the Ogden Land Company?”

“3. Does the City of Buffalo in this proceeding show a necessity for acquiring the fee of said lands?”

“4. Did any of the exceptions call for a reversal of the order confirming the appraised Commissioners’ report?”

All or nearly all of the assignments of error herein are predicated upon the lack of jurisdiction of the Court of Appeals of the State of New York to answer these questions. In other words, it is claimed by the plaintiff in error that, by the Constitution of the State of New York and the Code of Civil Procedure of said State, the jurisdiction of the Court of Appeals is limited to the review of questions of law (except in capital cases), and that, in answering the certified questions, the Court of Appeals necessarily reviewed all of the facts herein which involved the weight and sufficiency of the evidence.

It is conceded that the Court of Appeals is limited to a review of questions of law, but where the facts are undisputed or are established by documentary evidence the Court may look into the facts for the purpose of determining whether such undisputed facts support a proposition of law, and whether there is a question of fact or not depends upon the record and not upon any statement made by the Appellate Division of the Supreme Court.

As stated by the Court of Appeals in reviewing an order of the Appellate Division:

“It cannot create a question of fact by declaring that there is one, nor, by assuming to reverse on the facts, reverse a determination that does not involve a question of fact.

Whether there is a question of fact in a case is always a question of law, depending possibly upon a conflict of evidence and possibly upon conflicting inferences which may be drawn from uncontradicted evidence. Unless there was a material question of fact the reversal was an unlawful exercise of judicial power, and constituted an error that may be corrected by this Court. This is substantially the position of the learned counsel for the appellant, and the question, as correctly stated by them, is whether any view, which may fairly be taken of the evidence, supports the determination appealed from. In other words, as the Special Term has decided that the defendant's railroad has inflicted no injury upon the property of the plaintiff when the benefits are taken into account, while the Appellate Division has decided the other way, the question is whether there was any substantial evidence of excess of injury. If there was not, it was error for the Appellate Division to reverse, but if there was, we cannot weigh it or review it, but must affirm the order or dismiss the appeal. Our examination is, therefore, confined to the inquiry whether there is any evidence in the record which, not according to our view, but according to any reasonable view that may be taken, supports the conclusion of the Appellate Division." *Otten vs. Manhattan Railroad Company*, 150 N. Y. 401.

"Upon appeal from an order of reversal of

the Appellate Division, stating that the reversal was upon the law and the facts, the Court of Appeals has power to determine whether a question of fact is involved in the case, and if there is none it has jurisdiction to review the law." *Hirshfeld vs. Fitzgerald*, 157 N. Y. 166.

"If, on appeal from a judgment of reversal of the Appellate Division stating that the reversal was upon the law and the facts, an inspection of the record discloses that the facts underlying the conclusions in controversy are conceded or are not controverted, a question of law for the Court of Appeals arises as to the judgment that should be given thereon." *Griggs vs. Day and one, as surviving executors, etc.*, 158 N. Y. 1.

"A judgment cannot be reversed on the facts by the Appellate Division where all of the facts are of record and uncontroverted." *Westerfield vs. Rogers*, 174 N. Y. 230.

In the case under consideration is it conceded, or established by uncontroverted facts and by public records, that the plaintiff in error and his co-tenants at one time owned the bed of the Buffalo River and all of the land on either side, which was plotted and laid out into lots bounded by the bank of the river; that all of the land on either side of the river, prior to the commencement of this proceeding, had been sold by the plaintiff in error and his co-tenants, and that the only interest which the plaintiff in error had was to the bed of the

river, burdened with such rights as the public had therein.

These facts being conceded, or established by record proof and undisputed, there was no question of fact in the case and the Court of Appeals had jurisdiction and authority to answer the questions certified to it. *Reich vs. Dyer et al., as executors, etc.*, 180 N. Y. 107.

The Appellate Division of the Supreme Court reversed the order of the Special Term upon the law, and not upon the facts. Its order of reversal reads as follows:

"It is hereby ordered that the orders so appealed from be, and hereby are, reversed, and a rehearing ordered before new commissioners to be appointed by the Special Term, with costs to the appellant to abide the event." (Record, page 120).

If the Court had considered the reversal upon the facts, or had considered the facts in granting its order, it should have stated in the order itself that the reversal was upon the facts, or at least upon the law and the facts, and not having done so, its reversal is presumed to be upon the law only.

"Upon an appeal to the Court of Appeals from a judgment, reversing a judgment entered upon the report of a referee or a determination in the trial court; or from an order granting a new trial, upon such a rever-

sal, it must be presumed that the judgment was not reversed, or the new trial granted, upon a question of fact, unless the contrary clearly appears in the record body of the judgment or order appealed from." *Section 1338, Code of Civil Procedure of the State of New York.*

Further than this, the jurisdiction of the Court of Appeals being limited to the review of questions of law, the Appellate Division has no right or authority to certify to the Court of Appeals for its determination questions of fact, and it did not in this case attempt to do so, because the order allowing the appeal and stating the questions for the determination of the Court of Appeals shows and states clearly that it was submitting questions of law. Its order reads:

"Ordered, that said motion for a certificate allowing the City of Buffalo to appeal to the Court of Appeals be, and the same hereby is, granted, this Court certifying that the following questions of law have arisen, which, in its opinion, ought to be reviewed by the Court of Appeals, to-wit:"

And then follow the four specific questions which are hereinbefore quoted and set out at length.

This was the orderly and lawful way of having specific, material questions of law passed upon by the Court of Appeals for the purpose of finally determining litigation in the courts of the State of New York as provided by law.

“Appeals may also be taken from determinations of the Appellate Division of the Supreme Court in any department where the Appellate Division allows the same, and certifies that one or more questions of law have arisen, which, in its opinion, ought to be reviewed by the Court of Appeals, in which case the appeal brings up for review the question or questions so certified and no other; and the Court of Appeals shall certify to the Appellate Division its determination upon such questions.”
Section 190 of the Code of Civil Procedure of the State of New York.

It was well understood by the Appellate Division of the Supreme Court and by the Court of Appeals that the questions certified were questions of law which were material and necessary to be finally settled and determined by the highest court in the State so as to effectually and finally settle the controversy between the plaintiff in error and the City of Buffalo, and for that reason, and for that alone, the appeal to the Court of Appeals was allowed.

The facts in this case as to the location and extent of the property affected being admitted, or proved by undisputed documentary evidence, the question of ownership being admitted, the rights and interests of the parties established, the right and propriety of the defendant in error to take the property described in the resolution, upon making just compensation therefore, being conceded, or not questioned, the sole and only ques-

tion which remained was the extent of such compensation. The Appellate Division having concurred with the Commissioners and the Special Term in all of these matters and things, except as to the extent of the compensation, recognized the fruitlessness of further proceedings before new commissioners, until the questions of law certified by it to the Court of Appeals were settled or determined, granted leave to appeal and certified the questions as questions of law based upon the undisputed or conceded evidence, and the Court of Appeals accepted them as such and answered them as questions of law based upon such conceded and undisputed evidence and in coming to its conclusion said:

“At first sight questions one and two seem to involve questions of fact whether upon the evidence the respondent should have been awarded more than nominal damages. But in view of the circumstances that the reversal by the Appellate Division must be deemed to have been made as a matter of law (Code Civil Procedure, Secs. 1338, 1361; *Matter of Chapman*, 162 N. Y. 456; *People ex. rel. Manhattan Ry. Co. vs. Barker*, 165 N. Y. 305), and of the further fact that these questions are certified to us as ones of law, we have concluded that we may interpret them as propounding the inquiry in substance whether as a matter of law the evidence presented to the commissioners entitled the respondent to an award of more than nominal damages, and upon the other hand prohibited the commis-

sioners from awarding to him such nominal damages as just compensation.

We have no great difficulty in answering these questions to the effect that the commissioners were authorized upon the evidence presented to them if they saw fit so to do to award only nominal damages for the land sought to be acquired by the city. In reaching this conclusion we have assumed, as did the city in the institution of the proceedings, that the respondent was vested with the fee of the river bed. Upon the other hand, there does not appear to be any dispute that either by him or by the company, whose rights he represents, substantially all of the land abutting upon the river upon either side formerly owned by the company has been conveyed away. This is a matter of importance as bearing upon the value of the bed of the stream, because if the bed and fee to the abutting lands were owned by the same party it very well might be that the possible connected use of the two would be an element of much importance in passing upon the value of the bed.

Many witnesses were sworn before the commissioners in regard to the value of this bed and the amount of the damages which should be awarded for taking it. Their evidence presented a well-defined question of fact, the testimony ranging all of the way from a valuation at nominal figures to one of very substantial amount. In addition to hearing the tes-

timony of these witnesses the commissioners were under obligations to and we must assume did view the premises to be taken. Various theories were doubtless presented to them, as they have been to us, leading to the view that the land was of substantial value. These theories are more or less speculative.

We think that the commissioners were so justified by the evidence in making the award which they did make that we cannot say, as a matter of law, that there was no evidence to sustain their conclusions."

The plaintiff in error appeared before the Special Term of the Supreme Court pursuant to notice personally served upon him (Record, page 7), which notice stated that at said time and place an application would be made for the appointment of three commissioners to ascertain the just compensation to be made to the owners, mortgagees or parties in interest to the fee of the lands under the waters of the Buffalo River between the Buffalo Creek Indian Reservation, near Hamburg Street, to the easterly line of the city.

Pursuant to such notice, commissioners were appointed by the Court. No objection was then made by the plaintiff in error, or his attorneys, as to the regularity, sufficiency or constitutionality of the proceedings. If irregularities had existed (without conceding such point) the plaintiff in error waived the same and could not thereafter raise them. *In the Matter of the Application of*

Edward Cooper, Mayor, etc., et al., to acquire title to lands for a public market, 93 N. Y. 507.

The general Condemnation Law of the State of New York has no application to proceedings to acquire land for public purposes by a city or village where the charter of said city or village prescribes the manner of acquiring land for such public purpose. Chapter 23, Title I of the Code of Civil Procedure of the State of New York, known as the Condemnation Law, and which prescribes the mode and manner of procedure of acquiring land for public purposes, expressly exempts proceedings instituted by municipal corporations. Section 3383 of the Code, which is a part of said Condemnation Law, is as follows:

“So much of all acts and parts of acts as prescribe a method of procedure in proceedings for the condemnation of real property for a public use is repealed, except such acts and parts of acts as prescribe a method of procedure for the condemnation of real property for public use as a highway, or as a street, avenue or public place in an incorporated city or village, or as may prescribe methods of procedure for such condemnation for any public use for, by, on behalf, on the part or in the name of the corporation of the City of New York, known as the mayor, alderman and commonalty of the City of New York, or by whatever name known, or by or on the application of any board, department, commissioners or other officers acting for or

on behalf or in the name of such corporation or city, or where the title to the real property so to be acquired vests in such corporation or in such city; and all proceedings for the condemnation of real property embraced within the exceptions enumerated in this section are exempted from the operation of this title."

POINT II.

NEITHER THE TITLE TO THE LANDS SOUGHT TO BE ACQUIRED NOR THE NAVIGABILITY OF THE RIVER WERE ISSUES BEFORE THE COMMISSIONERS, AND WERE NOT TRIED EXCEPT TO THE EXTENT OF SHOWING THE PROPERTY TAKEN OR AFFECTED.

By instituting these proceedings the City of Buffalo, so far as it is concerned, conceded that the fee to the bed of the river was in Charles E. Appleby, as surviving trustee of the Ogden Land Company, subject to such rights as the public might have to travel upon and over the river.

The defendant in error, pursuant to the provisions of its Charter, instituted proceedings to acquire the fee to the bed of the river, asking for the appointment of commissioners to ascertain the

just compensation to be paid therefore, and, in arriving at the amount of such compensation, it became necessary for the commissioners to ascertain just what was taken or damaged, and for that purpose proof was produced before the commissioners to show that the plaintiff in error had parted with title to all of the lands adjoining the river on either side, and that the river was, and had been for years, a navigable stream.

These facts having been established before the commissioners, and they having come to the conclusion that all that was taken from the plaintiff in error was a naked fee, burdened with the right of travel, they fixed the value of such fee at a nominal sum. The river has, by various acts of the Legislature, been declared to be a public highway. The provisions of the Charter of the City of Buffalo from 1832 to the time of the commencement of this proceeding contained provisions with reference to the Buffalo River as follows:

“All those portions of the Big and Little Buffalo creeks within the bounds of said city be and are hereby declared to be public highways.”

§40, Chap. 174, Laws 1832.

“That part of the Buffalo Creek which is within the bounds of the city is hereby declared a public highway; and the Common Council shall have power, under this title, to widen, straighten or enlarge it.”

§1, Title VIII., Chap. 230, Laws 1853.

“Buffalo River, within the city, is a public highway.”

§15, Title IX., Chap. 516, Laws 1870.

“Buffalo River, within the city, is a public highway, but any bridge heretofore built and now existing over the same, and any swing or draw bridge hereafter built over the same, within the city, by authority of the Common Council, is a lawful structure.”

§404, Title XVIII., Chap. 127, Laws 1891.

The river within the limits of the City of Buffalo is practically an arm of Lake Erie and under the control and jurisdiction of the Secretary of War of the United States, pursuant to the Act of Congress of March 3, 1899, and the United States has assumed, and does exercise, control and jurisdiction over said river. *City of Buffalo vs. D., L. & W. R. R. Co. et al.*, 136 A. D. of the Supreme Court of New York, 274.

The case last above referred to related to the construction of a bridge across Buffalo River on lot 199, as shown on the map at page 118 of the Record, which is within the limits and across the lands sought to be acquired in this proceeding.

The plaintiff in error, being the owner of the naked fee, subject to the right of travel, and owning no lands on either side of the river, is en-

titled to nominal damages only. *In re 17th Street*, 1 Wend, 262; *In re Lewis Street*, 2 Wend, 472; *In re 32nd Street*, 19 Wend, 128 *Matter of the City of Brooklyn*, 73 N. Y. 179; *Matter of Adams*, 141 N. Y. 297.

The plaintiff in error herein claims, however, that the cases last above referred to have been criticised by recent cases, but upon examination it is found that the criticism is not of the measure of damages or of the manner of arriving at the same, but upon the question whether a deed bounding a piece of land by a street or highway conveys the fee to the center of the street. The above cited cases establish the proper measure of damages to be paid for any portion of the street so conveyed and taken.

The plaintiff in error relies very largely upon the case of *City of Buffalo vs. Pratt*, 131 N. Y., 299, in which substantial damages were awarded, but in that case the owner of the fee in the street, which was taken, was also the owner of the fee of the adjoining lands and the award was not for the fee taken, but for damage to the remaining premises, the Court saying:

“I think that within the circumstances of the case the respondents were entitled to be awarded, as the compensation provided to be made in the act, upon the taking by the City of the fee of the land in the street in front of their premises, such substantial damages as would be ascertained by measuring the

effect upon the value of their property of such a deprivation."

The effect of the last case was clearly stated by the Court in *Pratt vs. N. Y. C. & H. R. R. Co.*, 77 Hun. 139, which was an action to recover damages to adjoining property by reason of the construction and operation of a railroad within the highway. It appeared upon the trial that the plaintiff was the owner of the entire fee of the adjoining lands and the owner of an undivided one-half of the fee in the street. A verdict was rendered for the plaintiff, which upon appeal was reversed, the Court holding that:

"The damages to the fee of the street were nominal. The jury were instructed by the Court that the plaintiff was entitled to recover six cents only for injury to the street proper. The plaintiff's co-tenants in the fee of the street were not interested in the question of the damages claimed in the complaint. They, at most, would have been entitled to only one-half of the six cents. If the action had been simply for injuries to the fee of the street, the damages would have been nominal."

It was necessary for the commissioners to ascertain the value of the right taken, and, in order to arrive at its value, it was necessary to ascertain the location, situation and extent of the property taken.

POINT III.

NO PROVISION OF A UNITED STATES STATUTE, TREATY OR PROVISION OF THE UNITED STATES CONSTITUTION IS INVOLVED, AND THEREFORE THIS COURT HAS NO JURISDICTION TO REVIEW A JUDGMENT OF A STATE COURT ON WRIT OF ERROR.

The plaintiff in error had personal notice of the proceedings and appeared in court at the time of the appointment of the commissioners and raised no objections. He appeared before the commissioners appointed by the Supreme Court and made proof of the value of the property taken, according to his views. The proceedings were the orderly, legal and regular proceedings pointed out and laid down by the statutes of the State of New York regulating the acquiring of private property for public use by the City of Buffalo.

The only question involved was the value of the property taken, and was a question of construction of a State statute and procedure in local or State courts, and did not in any way involve the consideration or application of the United States Constitution or statutes.

The judgment entered herein is amply supported on grounds entirely independent of any federal question.

“To give this court (United States Supreme Court) jurisdiction to review a State judgment on writ of error it must appear affirmatively not only that a federal question was presented for decision by the State court, but that its decision was necessary to the determination of the case, and that it was actually decided, or that the judgment as rendered could not have been given without deciding it.” *The California Powder Works, Plaintiff in Error, vs, William E. Davis, administrator of the estate of Isaac Davis, deceased*, 151 U. S. 389.

This Court in construing a statute of the State of California, which provided for the widening of Dupont Street, and prescribed the procedure to be followed, held that such statute and the lawful procedure under it did not violate the United States Constitution and did not raise a federal question. Mr. Justice Harland, in delivering the opinion of the court, said:

“But errors in the mere administration of the statute, not involving jurisdiction of the subject and of the parties, could not justify this Court, in its re-examination of the judgment of the State court, upon writ of error, to hold that the State had deprived, or was about to deprive, the plaintiffs of their property without due process of law. Whether it was expedient to widen Dupont Street, or whether the Board of Supervisors should have so declared, or whether the Board of

Commissioners properly apportioned the cost of the work or correctly estimated the benefits accruing to the different owners of property affected by the widening of the street, or whether the board's incidental expenses in executing the statute were too great, or whether a larger amount of bonds were issued than should have been, the excess, if any, not being so great as to indicate upon the face of the transaction a palpable and gross departure from the requirements of the statute, or whether upon the facts disclosed the report of the commissioners should have been confirmed, are, none of them, issues presenting federal questions, and the judgment of the State court upon them cannot be reviewed here." *Lent vs. Tillson*, 140 U. S. 316.

To the same effect is *Chicago, Burlington & Quincy R. R. Co., Plaintiff in Error, vs. City of Chicago*, 166 U. S. 226.

The facts having been found by the Commissioners in the State court and the judgment being amply supported by facts independent of any federal question, this Court cannot examine the facts. Upon this question the Court said:

"It is clear that if these questions of fact are adequate to determine the controversy between the parties, and broad enough to maintain the judgment independent of any federal question, that we are without jurisdiction, although the State court may have

also decided such a question." *Eagan and one, Plaintiff in Error, vs. Hart et al.*, 165 U. S. 188.

To the same effect is *Eustis vs. Bolles*, 150 U. S. 361; *Conn., N. Y. & N. E. R. Co. vs. Woodruff*, 153 U. S. 689.

"Where the single question presented to the State court for its determination was whether, in fact, there had been a partition of lands between tenants in common, and such Court decided that the proof was insufficient to establish such partition, and that what had been done was not such as would bind the parties to the partition, held that in so deciding the State court decided no question of federal law. The decision of the State court as to whether such a partition was made is final and not subject to review in this court."

Phillips and others, Plaintiffs in Error, vs. Mound City Land & Water Association, 124 U. S. 605.

"Alleged errors of the State court which involve questions either of fact or of state, and not of federal law, are not reviewable here on writ of error."

Quimby and others vs. Boyd and others, 128 U. S. 488.

Mr. Justice Day, in delivering the opinion of the court in a case which involved the jurisdiction

of the United States Supreme Court to review a judgment of the State court on a writ of error, said:

“The jurisdiction of this court to review the proceedings of the State courts, as we have had frequent occasion to declare, is not that of a general reviewing court in error, but is limited to the specific circumstances of denials of federal rights, whether those pertaining to the constitutionality of federal or State statutes, or to certain rights, immunities and privileges of federal origin, specially set up in the State court and denied by the rulings and judgments of that court. Sec. 709, Rev. Stat., U. S. Nor does this Court sit to review the findings of facts made in the State court, but accepts the findings of the court of the State upon matters of fact as conclusive, and is confined to a review of questions of federal law within the jurisdiction conferred upon this court.”

Waters-Pierce Oil Co. vs. Texas, 212 U. S. 86.

In the hearing and determination of the proceeding involved herein no provision of the United States Constitution was involved. No provision of a State statute or constitution, which deprived the plaintiff in error of his property without just compensation, nor without due process of law, was involved. The only question involved at any time or place was the compensation to be made to the plaintiff in error for the property or right taken

from him by the City of Buffalo. The State court determined that question according to State or local law and in the orderly, ordinary, lawful way.

POINT IV.

THE WRIT OF ERROR SHOULD BE DIS-
MISSED FOR WANT OF JURISDICTION IN
THIS COURT, AND THE JUDGMENT AND
ORDER OF THE STATE COURT AFFIRMED.

CLARK H. HAMMOND,
Corporation Counsel,

Attorney for Defendant in Error,
Buffalo, N. Y.

GEORGE E. PIERCE,
Of Counsel.

Appendix "A"

TITLE XX.

OF EMINENT DOMAIN.

§417a. The city shall have power to take lands for public buildings, for parks, public grounds, squares, streets, alleys, fountains, canals, basins, slips and other public waters, docks and for any other corporate purpose or object, and to take proceedings to perfect its title where title has been acquired or attempted to be acquired, and has been found to be invalid or defective, and the latter proceeding may be joined with any new proceeding for acquiring lands for a similar purpose.

§417b. Whenever any work or improvement authorized by section four hundred and five of this act shall be undertaken the city may take for the purposes thereof, as provided in this act, lands held or used for public purposes by any corporation having the power of eminent domain, or otherwise held or used for public purposes; but in such case only such interest or easement shall be taken as may be necessary for carrying out such work or improvement, and to that extent such taking is hereby authorized.

§405. The city may widen, straighten, enlarge, clear from obstruction, dredge, deepen, embank and dyke the Buffalo River, Cazenovia Creek, the Black Rock harbor, the lake, the basins, slips and

waters in the city, and may put and maintain in navigable condition all of said waters in the city except Cazenovia Creek, and may construct new drainage channels to abate floods and prevent the overflow of the waters of the said Buffalo River and Cazenovia Creek, or either of them. The expense or any part of the expense of any work or improvement mentioned in this section may be paid out of the general fund or by local assessment, as the Common Council shall determine, provided, however, that not more than one-third of the expense of doing any of the work or making any of the foregoing improvements, when done or made for the purpose of abating floods and preventing the overflow of the waters of the Buffalo River and Cazenovia Creek, or either of them, shall be paid out of the general fund, and the remainder of such expense shall be defrayed by local assessment. Nothing in this act shall be construed to allow the City of Buffalo to have, use or exercise any control over the canals, basins, harbors, slips or other works belonging to the State within the limits of the city.

§417d. If at any time a proceeding to take lands, as in this title provided, shall be found defective or insufficient, the city may proceed anew to take such lands in the same manner as if no prior proceeding had been begun, and if in possession the city may continue in possession of such lands until the final conclusion of such new proceeding, and the Court may stay all actions or proceedings against the city on account thereof.

§418. When it shall be intended to take any lands for any of said purposes or objects the Board of Aldermen shall require the Board of Assessors to ascertain and certify the district that will be benefited thereby, and will be assessed therefor, and the Common Council shall not adopt any resolution declaring its intention to take such lands until the report of the Assessors has been received and confirmed. The Common Council shall thereupon, by resolution, declare such intent, and describe the lands intended to be taken, and shall at the same time declare whether the expense of the same shall be paid by general or local fund, or in part by a local fund, and, if wholly or partly by a local fund, define the district that will be assessed therefore. Upon such resolution becoming of force the City Clerk shall cause the same to be published in the official paper daily for two weeks.

§419. Within three months after the expiration of the said publication the Common Council may declare, by resolution, to be adopted by a vote of two-thirds of the members of each board, that the city has determined to take such lands for the purpose specified in such resolution.

§420. Upon such resolution becoming of force, the Corporation Counsel shall give notice that the city has determined to take the lands therein described for the purpose stated, and that on a specified day he will apply to a court, to be held on that day, in the city, naming the court of record to which such application is to be made, for the appointment of three commissioners to ascertain the just compensation to be made for such lands, by

publishing such notice daily for two weeks in the official paper, by leaving a copy thereof at each inhabited building on such lands with a person of full age, and by serving a copy thereof personally on each person who, by the records of the Erie County Clerk's office appears to be the owner or mortgagee of such lands or any part of them or by depositing it in the postoffice in the city, with the postage prepaid, addressed to him at Buffalo at least ten days before the time when the application is to be made. If any such owner or mortgagee has an agent registered, as provided in this act, the notice, when not personally served on such owner or mortgagee, shall be served on such agent personally, or by depositing it in the postoffice addressed to him.

§421. At the opening of such court on the day designated in the notice, or as soon thereafter as he can be heard, the Corporation Counsel shall, upon a copy of said resolutions, certified by the City Clerk, and proof of the giving of said notices as aforesaid, apply to such court to appoint such commissioners. Such Court shall hear such application, and may appoint three commissioners to ascertain the just compensation to be made for such lands.

§422. If an attorney-at-law shall appear for any person in such proceedings, and serve notice thereof upon the Corporation Counsel, he shall be entitled to notice of all subsequent proceedings. The Corporation Counsel shall cause the order appointing the commissioners, together with a notice

of the pendency of the proceeding directed to all persons upon whom service has been made, as provided in section four hundred and twenty of this act, to be filed in the office of the Clerk of the County of Erie, who shall record the same in like manner as notice of pendency in an action to foreclose a mortgage. * * *

§423. If any commissioner shall die or be disqualified or excused by the Court from serving, the Court, upon application of the Corporation Counsel, may appoint another in his place. In all cases of appraisal under this act, when the mode or manner of conducting all or any part of the proceedings for the appraisal and proceedings consequent thereon are not expressly provided for by this act, the Court before which such proceedings may be pending shall have the power to make all necessary orders and give all the proper directions to carry into effect the object and intent of this act. The practice in such cases shall conform, as near as may be, to the ordinary practice in such court. The Court may, from time to time, upon the application of the Corporation Counsel, with or without notice, as the Court may direct, extend the commissioners' time to make and file their report until such time as the Court may fix, and such order shall take effect upon the filing thereof. The proceedings of the city in exercising the right of eminent domain shall not be enjoined, restrained or interfered with by any order or mandate of any Court or judge.

§424. The commissioners, before they enter upon their duties, shall take and subscribe an oath

that they will faithfully perform their duties, and will ascertain and report the just compensation to be made for the lands. Any of them may issue subpoenas and administer oaths to witnesses. A majority of them may adjourn the proceedings before them from time to time in their discretion. They shall appoint a time and place for the hearing. They shall view the lands and hear all legal evidence offered by the city or any person interested in the lands. They shall ascertain the just compensation to be made to the owners of and to the persons interested in the lands; and they shall, within sixty days after their appointment, make a report to the Court which appointed them, by filing the same, together with their oath, with the clerk of such court. The report shall be signed by all of the commissioners.

§425. If the commissioners shall not be able to agree, they shall certify the fact to the Court, which may, upon the application of the Corporation Counsel, appoint new commissioners.

§426. Upon the filing of the report of the commissioners the Corporation Counsel shall communicate the fact of such filing, stating the whole amount of the awards to the Common Council. The Common Council may, at or after the second regular meeting thereafter, by resolution, direct that the Corporation Counsel shall apply to the Court for the confirmation of said report or for the discontinuance or abandonment of said proceeding, and the Corporation Counsel shall comply with such resolution. Such action of the Common

Council shall be taken within three months from the time when the filing of such report shall have been communicated to it by the Corporation Counsel. In cases the Corporation Counsel shall apply for the discontinuance or abandonment of such proceeding the Court shall ascertain and determine the reasonable and necessary expenses and disbursements incurred by each person who has appeared in said proceeding, either in person or by attorney, and the same shall be paid to such persons by the city. The city shall pay all taxes and assessments which shall be levied or assessed after the confirmation of the report upon any of the property taken as herein prescribed. Upon the coming in of the report of the commissioners the Court may confirm the report or annul it, or refer it back to the commissioners, or to new commissioners to be appointed by it. If the Court shall confirm the report of the commissioners, the order of confirmation shall recite the proceedings, and describe the lands taken, and shall be conclusive upon the city and upon the owners of and all persons interested in the lands.

§428. The order of confirmation shall be recorded in the office of the Clerk of Erie County and in the office of the City Clerk, and such record, or a copy thereof, certified by the clerk, shall be evidence of the facts therein contained.

§431. Within one year after the confirmation of the report of the commissioners the city shall make to the persons to whom compensation shall have been awarded by the commissioners the compensation awarded to them respectively.

§432. In case any such person shall refuse the same, or be unknown, or incapacitated, or the right to the compensation be disputed or be doubtful, the city may pay the amount of such compensation into the court in which the proceedings to take the lands were had, with a statement of the facts and circumstances of the case.

§433. The Court shall have power to order the investment of such money, to ascertain who is entitled to it, or any and what part of it, and to order its payment accordingly.

§434. Upon making to the respective persons the compensation awarded to them, or paying the same into court as aforesaid, the fee of the lands taken shall vest in the city.